REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. HOR.

VOL. V.

Containing the Cases of EASTER, TRINITY, and MICHAELMAS Terms
In the 44th and 45th Years of GEO. III. 1804.

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1805.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.

ATTORNEY-GENERAL.

The Honorable SPENCER PERCEVAL.

SOLICITOR-GENERAL.

Sir THOMAS MANNERS SUTTON, Knt.

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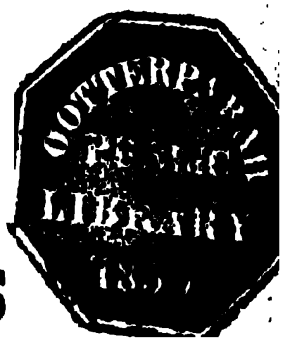

CASES

ARGUED AND DETERMINED 1804.

IN THE

Court of KING's BENCH,

IN

Eaſter Term,

In the Forty-fourth Year of the Reign of GEORGE III.

IN the laſt vacation died, at his houſe in *George-ſtreet, Weſtminſter*, the Right Honorable RICHARD PEPPER Lord ALVANLEY, Lord Chief Juſtice of the Court of Common Pleas. He was ſucceeded in this term by

JAMES MANSFIELD, Eſq. one of His Majeſty's Counſel learned in the Law, who was ſworn into office on *Tueſday* the 24th of *April*, and was knighted. And on the 25th he was called to the degree of Serjeant at Law, and took his ſeat on the Bench, and gave rings with this motto, *Sero in Cœlum redeas.*

On *Saturday* the 28th of *April* the following Gentlemen took their places within the Bar:

As one of His Majeſty's Serjeants learned in the Law, Mr. Serjeant *Williams*.

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As His Majeſty's Counſel learned in the Law,
Richard Holliſt, of the Middle Temple, Eſq.
Thomas Milles, of Lincoln's Inn, Eſq.
George Wilſon, of Lincoln's Inn, Eſq.
James Topping, of the Inner Temple, Eſq.

With a Patent of Precedence,
John Fonblanque, of the Middle Temple, Eſq.

Thurſday, April 19th.

The Mayor, &c. of CARLISLE *againſt* WILSON.

Where it appeared in evidence upon an action of indebitatus aſſumpſit for toll that a corporation were entitled by a general grant of toll, explained by uſage to be due for all commercial goods paſſing in and out of their city on horſes or in carts or waggons, (that is, at the rate of 1*d.* for every horſe-load, and 2*d.* for every cart-load drawn by one horſe, and 2*d.* more for each additional horſe); held that any alteration of the carriage by which the goods were ſo conveyed, as by taking them in ſtage coaches inſtead of carts or waggons, could not vary the right of toll in the proportion of 2*d.* for each horſe drawing the coach, although the number of horſes were eſtimated by the weight of paſſengers rather than of goods.

IN aſſumpſit, the fourth count, to which the evidence of the plaintiffs principally applied, was on an indebitatus aſſumpſit for tolls and duties due and payable from the defendants to the plaintiffs for the paſſage of coaches and carriages of the defendants, loaded with goods and merchandizes, in and through the city of *Carliſle*. Plea, non aſſumpſit. The action was brought to try the right of the corporation to take toll from the defendants as the proprietors of a ſtage coach paſſing in and out of the city with parcels, who claimed to be exempt, principally on the ground that their carriages were chiefly adapted to the conveyance of paſſengers, and that the taking of goods for hire was only a ſecondary incidental employment. At the trial before *Chambre* J. at *Carliſle*, the plaintiffs, in ſupport of their claim to toll for horſes, carts, and carriages, paſſing with goods in and out of the city, produced in evidence an inquiſition taken at *Carliſle* on the 6th of *April*, 25 *Ed.* 3., and returned into Chancery, concerning the liberties and cuſtoms belonging to the city of *Carliſle*, &c. and why the citizens had not rendered to the Crown

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80*l.* per annum rent for the profits of the liberties, &c. whereby it was found that the citizens of the ſaid city had been accuſtomed to have amongſt their liberties and cuſtoms, (inter alia,) "Theolonium intrinſecum et forin-"ſecum vocat. *Thurg-Toll* (*i. e.* Toll Thorough) ut par-"cellas firmæ civitatis illius; et quodque prædicti cives "habuerunt omnes libertates et proficua prædicta a tem-"pore quo non exiſtit memoria quouſque," &c. and then ſtating a wrongful obſtruction in the exerciſe of their rights. Alſo a charter from the Crown of the 7th of *February*, 26 *Ed.* 3. reciting the ſaid inquiſition, and granting to the citizens (inter alia) the ſaid toll, by the ſame deſcription as in the inquiſition. And this charter, together with all liberties, cuſtoms, privileges, franchiſes, immunities, juriſdictions, and grants, is ratified and confirmed to the corporation by a charter of the 13 *Car.* 1., under which the corporation has its preſent corporate name. Alſo the uſage of the corporation to repair and pave all the ſtreets of the city was proved and admitted. With reſpect to the collection in fact of toll, it appeared to have been the uſage as far back as living memory could trace to pay 1*d.* for every horſe-load of commercial goods for ſale, either carried in or out of the city; (unleſs the goods were under the value of 13½*d.*, and then no more than half toll was ever paid, and ſometimes nothing). If the goods were conveyed in a cart drawn by one horſe, then 2*d.* was paid; if by more than one horſe, 2*d.* in addition for each horſe, unleſs the carriers compounded for their tolls. The value of the goods in carts made no difference; but if the horſe or cart merely paſſed through the city with the ſame goods, they paid but one toll. For many years back the proprietors of public *waggons* had uſually compounded for their tolls; if not, 2*d.* a-horſe

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was taken from the waggoner. Nothing was ever taken for hay, corn, houſehold goods, &c. It further appeared that ſtage coaches had been uſed in *Carliſle* for about 50 years paſt; but no claim was made in reſpect of them for toll till about 15 years ago, which was then reſiſted. That where the proprietors had forwarded goods in carts they had paid the uſual toll; and they had alſo paid when fiſh and other articles had been ſent into the city to be forwarded by the coaches: but this was explained to be toll paid for the bringing in of ſuch articles by horſes or carts, and not for the ſending them on by the coaches. The goods for which toll was demanded in this inſtance were commercial goods for ſale ſent by the defendants' coach. The defendants produced no evidence; and the caſe went to the jury with the learned Judge's obſervations to them, that the right to the horſe and cart toll was clearly proved, and that poſſibly the conſequence of that uſage might, as to the toll in diſpute, be a mere legal queſtion upon which either party might take the opinion of the Court above: and he therefore left the caſe to them upon the uſage; telling them that if they were ſatisfied that the plaintiffs were entitled to a toll on carriages carrying goods (ſuch as had been in uſe) the payment of the toll could not be evaded merely by uſing carriages of a different conſtruction from common carts and carriages; and that the only diſtinction he could point out for their attention was that the principal uſe of the coaches being for the carriage of paſſengers, for which no toll was due, and it appearing that the quantum of the toll was eſtimated by the number of horſes employed in drawing the carriages, the proportion of the number of horſes to them muſt be greater than the relative quantity of the goods which they carried would require; in conſequence of which a much

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much heavier toll in reſpect of the goods would fall on the coach-owners than on the owners of other carriages uſed chiefly for the conveyance of goods. And alſo that for a conſiderable number of years ſince coaches had been ſet up in *Carliſle* the corporation had not aſſerted their claim of toll for ſuch carriages. The jury found a verdict for the defendants. But upon the report of the caſe, after a rule Niſi granted in *Michaelmas* term laſt for ſetting aſide the verdict and granting a new trial, the learned Judge intimated a doubt whether the evidence did not require him to have told the jury that if they were ſatisfied that the right to the toll for the paſſage of carts and waggons was eſtabliſhed by the written and parol evidence, it would follow as a legal conſequence that the plaintiffs were entitled to the like toll for the paſſage of coaches carrying goods of the like deſcription.

Park, *Holroyd*, and *Hullock*, in ſhewing cauſe againſt the rule, contended that the grant of toll, being in general terms, muſt be conſtrued and reſtrained by the uſage; and here it appeared by the evidence to be a grant of toll for the carriage of goods ſub modo, that is, by horſes or in carts or waggons. In the ſingle inſtance that any attempt was made to extend it to coaches the claim was reſiſted with effect; and this extends back through a period of 50 years. And there is no abſurdity in ſuppoſing that a toll might be granted on goods carried in a particular manner, which was not meant to extend to goods carried in a different way; eſpecially as the toll in this caſe varies according to the number of horſes employed in the draught of the carriage, which may be reaſonable enough as applied to carriages whoſe principal uſe is for the conveyance of goods, as furniſhing a good criterion of

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the weight of the draught, and conſequently apportioning the toll to the probable injury done to the ſtreets: but as applied to coaches, the number of whoſe horſes is adapted to the weight of paſſengers, for whom no toll is payable, and not to the goods, which may be trifling in weight and value, the ſame rate of toll muſt preſs very unequally and unfairly. By theſe means the ſame toll may be paid for one ſmall parcel which happens to be in a coach drawn by four horſes as for various goods to a conſiderable amount drawn by the ſame number of horſes in a cart or waggon. It is not therefore the ſhape or denomination of the carriage which conſtitutes the difference, but the purpoſe to which it is principally applied.

Cockell Serjt. *Wood*, *Topping*, and *Raine*, contrà, were ſtopped by the Court.

Lord ELLENBOROUGH C. J. The cuſtom in ſubſtance, as to the preſent inquiry, is to pay a toll for goods conveyed in carriages in proportion to the number of horſes: what the form or denomination of the carriage may be is immaterial, whether it be cart, waggon, or coach; if it be applied to the uſe of drawing goods for ſale the cuſtom attaches upon it. The reaſon why the toll has not been in fact collected from the owners of public coaches is becauſe till of late years it has not been the general cuſtom of that part of the country to convey goods in ſuch carriages, and therefore the collection of it might not have been worth attending to: and there is no reaſon to attribute the omiſſion to any other cauſe. Within the memory of living perſons there were no more than four coaches kept in *Cumberland*. Biſhop *Nicolſon*, who wrote a hiſtory of that county, ſtates that about the year 1710,

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in travelling from *Roſe Caſtle*, near *Carliſle* towards *London*, with a young nobleman his pupil, they were obliged to go as far as *Stamford* before they met with a ſtage-coach to carry them on. As to the diſproportion ſtated to ariſe from the application of the toll to carriages of this deſcription, where the number of horſes is adapted more to the carriage of paſſengers than of goods, that is the party's own act, of which he cannot complain. The corporation cannot diſcriminate the proportion adapted to each, and may therefore charge for the whole number which are actually uſed for the draught of the carriage in which tollable goods are conveyed; for the toll is payable in reſpect of the goods and not of the coach. Upon the ſame principle, where a man mixes his corn with mine in my bag, I may take the whole, becauſe I cannot diſtinguiſh to ſeparate them again, and it was his own fault to mingle them. So if the coach-owners will multiply the number of their horſes becauſe of the additional weight of paſſengers which they carry, together with goods for which the toll is payable in proportion to ſuch number, it is their own act, and the corporation have no means of aſcertaining the proportion of horſes uſed for each. Here then the right to the toll having been clearly made out, there muſt be a new trial.

GROSE J. The queſtion is, Whether any thing were due for toll in this caſe? The toll is that duty which perſons paſſing in or out of the city with goods for ſale on horſeback or in carriages are liable to pay. It is not merely for the paſſage of the perſon, but of the perſon with goods. The uſage was for ſome time probably confined to goods carried on horſeback; afterwards, as carts came into common uſe, it was extended to them; and

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there is no reaſon why the toll ſhould not be extended to coaches, ſince they have come into uſe for the purpoſe of conveying commercial goods. And as to theſe latter having been ſuffered to carry for ſome years back without the corporation collecting from them, it was probably not worth their while to collect it in the firſt inſtance, till that mode of conveyance grew to be more frequent. But ſince that is the caſe, there is no reaſon why the ſame toll ſhould not be collected from carriages of this deſcription as from carts when applied to the ſame purpoſe.

LAWRENCE J. The toll is payable for goods conveyed on horſes and in carriages; and in order to meaſure the quantum of toll in the latter caſe they reckon the number of horſes uſed in the conveyance. And when we attend to the occaſion of granting the toll, which was for the repair of the ſtreets, ſuch a meaſure ſeems reaſonable. For if the goods were carried on horſeback, that was not conſidered as occaſioning much damage to the ſtreets, and therefore the toll was only 1*d.*: but if conveyed in a cart with one horſe, the damage done was conſidered to be double, and 2*d.* was taken: and if more horſes were neceſſary to draw the weight, the injury was reckoned to be proportionably greater. The carrier was conſidered to be a competent judge of the number of horſes required to draw the weight, and that mode of aſcertaining the quantum of the toll was liable to no difficulty or diſpute. It is no objection then that the coach may have but one parcel of goods to convey; for it is for the carrier to conſider whether it be worth his while to proceed with his load or not; but if he do, he muſt pay toll according to the number of horſes which he uſes.

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LE BLANC J. By the inquiſition and ancient grants it appears that toll was given to the citizens of *Carliſle* in general terms, leaving it uncertain by what the quantum was to be meaſured. This is ſupplied by the evidence of the uſage, whence it appears that it is to be eſtimated by the horſe-load when the goods are carried in that manner, or when conveyed in carriages, by the number of horſes drawing each carriage. Formerly it appears that the only carriages in which goods were conveyed were carts and waggons; and it is not at all improbable that when thoſe were the only carriages in uſe, they took as many paſſengers in proportion to the quantity of goods as coaches do now. • Yet during all that time the toll has always been claimed from the carrier, and not from the proprietors of the reſpective goods, in proportion to the number of horſes by which the carriage was drawn. And it is more advantageous to the public that the toll ſhould be collected in this manner: for when claimed from the carrier he pays one entire toll for all the parcels of goods together in proportion to the number of his horſes; but if it were to be claimed from the owners of the goods, then each would have to pay toll according to the ſame proportion. If then the coach proceed with paſſengers only, without any commercial goods, no toll will be payable; but if it have ſuch goods in it, the toll is payable according to the number of horſes by which the coach is drawn. In this manner it has always been collected from carts and waggons; and altering the form or name of the carriage can never affect the claim to the toll.

Rule abſolute.

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Thurſday, April 19th.

WAIN and Another *againſt* WARLTERS.

No perſon can, by the ſtatute of frauds, be charged upon any *promiſe* to pay the debt of another, unleſs the *agreement* upon which the action is brought, or ſome note or memorandum thereof, be *in writing*; by which word *agreement* muſt be underſtood the *conſideration* for the promiſe as well as the *promiſe* itſelf. And therefore where one promiſed in writing to pay the debt of a third perſon, without ſtating on what conſideration; it was holden that *parol* evidence of the conſideration was inadmiſſible by the ſtatute of frauds; and conſequently ſuch promiſe appearing to be without conſideration upon the face of the written engagement, it was nudum pactum and gave no cauſe of action.

THE plaintiffs declared that at the time of making the promiſe after-mentioned they were the indorſees and holders of a bill of exchange, dated the 14th of *February* 1803, drawn by one *W. Gore* upon and accepted by one *J. Hall*, whereby *Gore* requeſted *Hall*, ſeventy days after date, to pay to his, *Gore*'s, order, 56*l.* 16*s.* 6*d.*; which bill of exchange *Gore* had before then indorſed to the plaintiffs, and which ſum in the bill mentioned was at the time of making the promiſe by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the ſaid promiſe by the defendant, had retained one *A.* as their attorney to ſue *Gore* and *Hall* reſpectively for the recovery of the ſaid ſum ſo due, &c. whereof the defendant, at the time of his promiſe, &c. had notice. And thereupon, on the 30th of *April* 1803, at, &c. *in conſideration of the premiſes, and that the plaintiffs*, at the inſtance of the defendant, *would forbear* to proceed for the recovery of the ſaid 56*l.* 16*s.* 6*d.* he, the defendant, undertook and promiſed the plaintiffs to pay them by half paſt four o'clock on that day 56*l.* and the *expences* which had *then been incurred* by them *on the ſaid bill*. The plaintiffs then averred that they did, within a reaſonable time after the defendant's promiſe, ſtay all proceedings for the recovery of the ſaid debt, and have hitherto *forborne to proceed* for the recovery thereof; and that the expences by them incurred on the ſaid bill at the time of making the promiſe by the defendant, and in reſpect of their having ſo retained the ſaid *A.*, and on account of his having, before the defendant's ſaid promiſe,

drawn

drawn and ingroſſed certain writs called ſpecial capias' againſt *Gore* and *Hall* reſpectively on the ſaid bill, amounted to 20*l.*, of which the defendant had notice; yet the defendant did not at half paſt four o'clock on that day, &c. nor at any time before or ſince, pay the ſaid ſum of 56*l.* and the ſaid expences incurred, &c. There was another ſpecial count, charging that the reaſonable expences incurred on the bill were ſo much, which the defendant had refuſed to pay. And the common money counts. 1804.

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In ſupport of the undertaking laid in the declaration the plaintiffs, at the trial at *Guildhall*, produced the written engagement ſigned by the defendant, which was in theſe words; "Meſſrs. *Wain* and Co., I will engage to "pay you by ½ paſt 4 this day fifty-ſix pounds and ex- "pences on bill that amount on *Hall.* (Signed) *Jno.* "*Warlters*, (and dated) No. 2, *Cornhill*, *April* 30th, "1803." Whereupon it was objected, on the part of the defendant, that though the promiſe, which was to pay the debt of another, were *in writing*, as required by the ſtatute of frauds, yet that it did not expreſs *the conſideration* of the defendant's promiſe, which was alſo required by the ſtatute to be in writing; and that this omiſſion could not be ſupplied by parol evidence, (which the plaintiffs propoſed to call in order to explain the occaſion and conſideration of giving the note); and that for want of ſuch conſideration appearing upon the face of the written memorandum, it ſtood ſimply as an engagement to pay the debt of another without any conſideration, and was therefore nudum pactum and void. And Lord *Ellenborough* C. J., upon view of the ſtatute of frauds, 29 *Car.* 2. *c.* 3. *ſ.* 4., which avoids any ſpecial promiſe to anſwer for the debt of another, "unleſs the *agreement* upon which

"the

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"the action ſhall be brought, or ſome memorandum or "note thereof, ſhall be in writing, and ſigned by the party "to be charged therewith," &c., thought that the term *agreement* imported the ſubſtance at leaſt of the terms on which *both* parties conſented to contract, and included the *conſideration* moving to the promiſe, as well as the *promiſe* itſelf: and the *agreement* in this ſenſe not having been reduced to writing for want of including the *conſideration* of the promiſe, he thought it could not be ſupplied by parol evidence, which it was the object of the ſtatute to exclude; and therefore nonſuited the plaintiffs. A rule niſi was obtained in the laſt term for ſetting aſide the nonſuit and granting a new trial, on the ground that the ſtatute only required the *promiſe* or binding part of the contract to be *in writing*, and that parol evidence might be given of the conſideration, which did not go to contradict, but to explain and ſupport the written promiſe.

Garrow and *Lawes* ſhewed cauſe againſt the rule. The queſtion is ſimply this, Whether *parol* evidence can be given of an *agreement* which the ſtatute of frauds avoids unleſs it be *in writing?* The words are "that no action "ſhall be brought whereby to charge the defendant upon "any ſpecial promiſe to anſwer for the debt, &c. of ano-"ther perſon, &c. unleſs the *agreement* upon which ſuch "action ſhall be brought, or ſome memorandum or note "thereof, ſhall be *in writing*, and ſigned by the party to "be charged therewith, &c." Now to every *agreement* there muſt be at leaſt two parties; and, in order to make it available in law, there muſt be ſome conſideration for it; which neceſſarily forms part of the agreement itſelf, being that in reſpect of which either party conſents to be bound. It is no anſwer to ſay that the parol evidence

offered of the consideration, namely, the forbearance to sue *Hall*, did not go to contradict the written promise; it is enough that being part, and a material part, of the *agreement*, it was not reduced to writing and signed by the party to be charged, as required by the statute. The effect of such parol evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration; and this would be letting in all the dangers of fraud and perjury, which it was the object of the statute to guard against. Upon the face of the paper the debt appears to be the debt of another; and as a mere promise to pay the debt of another, without any consideration, would before the statute have been void as nudum pactum at common law; so it is not made good by the statute without a consideration in law for entering into such an agreement; which *agreement*, i. e. the whole agreement, or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise, must be made in writing. The consideration is an essential part of every executory agreement; and this was altogether executory, on the part at least of the defendant. If the agreement had been declared on as in writing, the mere production of the note would not have proved the consideration of forbearance laid in the declaration; and such consideration could not have been supplied by parol evidence. In *Preston* v. *Merceau* (*a*), where the plaintiff had agreed in writing with the defendant's testator to let him certain premises at a certain rent; parol evidence, tendered to shew that the tenant had agreed to pay a further sum for ground-rent to the ground landlord, was rejected as subversive of the statute of frauds; although it was there

(*a*) 2 *Blac.* 1249.

contended

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contended that the evidence offered did not go to *alter* but to *explain* the agreement. So in *Gunnis* v. *Erhart* (*a*) the verbal declaration of an auctioneer at the time of ſale, that there was a charge on the eſtate, was deemed inadmiſſible to contradict the printed conditions, which ſtated the premiſes to be free from all incumbrances.

Erſkine and *Marryat*, in ſupport of the rule, ſaid that the evidence tendered in the two caſes cited went not to explain but to contradict the written agreements; in the one caſe to increaſe the quantum of the rent ſpecified, in the other to ſubſtract ſo much as the charge amounted to from the value of the eſtate which was offered for ſale *free from incumbrances*. But here the parol evidence went merely to ſhew on what occaſion the written agreement had been entered into; and it is in common practice to admit parol evidence for ſuch a purpoſe: it is part of the res geſtæ, and no part of the agreement itſelf, which muſt in its nature be executory at the time of the writing made. The foundation of the action in this caſe is not the writing, but the *promiſe* by the defendant to pay the debt of *Hall*. This before the ſtatute of frauds might have been proved wholly by oral teſtimony, but ſince that ſtatute the promiſe can only be evidenced by writing ſigned by the party to be charged therewith, or by ſome other lawfully authoriſed. It is difficult indeed to account for the introduction of the word *agreement* into the latter part of the clauſe, which in its ſtrict ſenſe, as compounded of "*aggregatio mentium*, or the union of two or more minds in a thing done or to be done (*b*)," is more properly applicable to the other branches of the clauſe, namely, "an *agreement* on conſideration of marriage, or

(*a*) 1 *H. Blac.* 239. (*b*) 1 *Com. Dig.* 311.

"upon

"upon *contract* or ſale of lands, &c. or upon any *agree-* "*ment* not to be performed within the ſpace of one year, "&c. than to any ſpecial *promiſe* by an executor to an- "ſwer damages out of his own eſtate, or to any ſpecial "*promiſe* to anſwer for the debt, &c. of another." To ſuch *promiſes* the word *agreement* can only be conſidered applicable ſo far as it is ſynonimous to *engagement* or *undertaking*, in which ſenſe it is often uſed in common parlance, and therefore means in this reſpect the agreement or promiſe to pay the debt of another. Beſides, the ſtatute does not require the *whole* agreement to be ſet out in form, but it is ſufficient if there be a *note* or *memorandum* of it in writing; that is, ſo much of the agreement as is obligatory on "the party to be charged therewith." In whatever form of words therefore the *promiſe* is made, which before the ſtatute would have been evidence to bind the party making it under the circumſtances of the caſe, it will, if thoſe words are reduced into writing, ſtill bind him ſince the ſtatute under the like circumſtances. But in either caſe the inducement for making ſuch promiſe, which is part of the res geſtæ, may be evidenced by parol. Thus, ſuppoſe a promiſe in writing to pay the *expences* attending a certain bill drawn by another; parol evidence muſt neceſſarily be let in to ſhew to what bill the promiſe was meant to apply, and how the expences aroſe, and the bill itſelf would be produced. And this would be evidence not to vary, but to corroborate the written promiſe. The 3d, 7th, and 17th ſections of the act all require the ſignature of the party to ſome note in writing in order to charge him with the ſeveral ſubject matters of thoſe ſections. But in all thoſe caſes the party muſt be charged on the ſpecial written *agreement*; but here he is charged on the *promiſe*, of which the writing is only evidence.

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Yet the 4th ſection ſuppoſes that the party is to be charged *upon the agreement*, "unleſs the agreement *upon* "*which* ſuch action ſhall be brought," &c.; which ſhews that *agreement* as there uſed means no more than *undertaking* or *engagement*. And in this ſenſe an *agreement* ſigned by one party only on a ſale by auction was holden ſufficient to charge him within the ſtatute of frauds (*a*). [Lord *Ellenborough* C. J. There it was deemed ſufficient proof of ſuch agreement ſo as to charge the party ſigning it. He was eſtopped by his ſignature from protecting himſelf under the ſtatute. But there the conſideration appeared in writing]. They then obſerved, that though the objection muſt have often before occurred in actions of this ſort, which were in common practice, the word *agreement* had never before received ſuch a conſtruction as applicable to this branch of the clauſe.

Lord ELLENBOROUGH C. J. after noticing the definition of the word *agreement* by Ld. C. B. *Comyns*, who conſidered it as a thing to which there muſt be the aſſent of two or more minds, and which, he ſays, ought to be ſo certain and complete that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of *Plowden*; and better (his Lordſhip obſerved) could not be cited:

In all caſes where by long habitual conſtruction the words of a ſtatute have not received a peculiar interpretation, ſuch as they will allow of, I am always inclined to give to them their natural ordinary ſignification. The clauſe in queſtion in the ſtatute of frauds has the word *agreement*, ("unleſs the *agreement* upon which the action "is brought, or ſome memorandum or note thereof ſhall

(*a*) *Seton* v. *Slade*, 7 *Veſ. jun.* 265.

"be

" be in writing," &c.) And the queſtion is, Whether that word is to be underſtood in the looſe incorrect ſenſe in which it may ſometimes be uſed, as ſynonimous to *promiſe* or *undertaking*, or in its more proper and correct ſenſe, as ſignifying a mutual contract on conſideration between two or more parties? The latter appears to me to be the legal conſtruction of the word, to which we are bound to give its proper effect; the more ſo when it is conſidered by whom that ſtatute is ſaid to have been drawn, by Lord *Hale* (*a*), one of the greateſt Judges who ever ſat in *Weſtminſter-hall*, who was as competent to expreſs as he was able to conceive the proviſions beſt calculated for carrying into effect the purpoſes of that law. The perſon to be charged for the debt of another is to be charged, in the form of the proceeding againſt him, upon his ſpecial *promiſe*; but without a legal conſideration to ſuſtain it, that promiſe would be nudum pactum as to him. The ſtatute never meant to enforce any promiſe which was before invalid merely becauſe it was put in writing. The obligatory part is indeed the *promiſe*, which will account for the word *promiſe* being uſed in the firſt part of the clauſe, but ſtill in order to charge the party making it, the ſtatute proceeds to require that the *agreement*, by which muſt be underſtood *the agreement in reſpect of which the promiſe was made*, muſt be reduced into writing. And indeed it ſeems neceſſary for effectuating the object of the ſtatute that the conſideration ſhould be ſet down in writing as well as the promiſe; for otherwiſe the conſideration might be illegal, or the promiſe might have been made upon a condition precedent, which the party

(*a*) Lord *Mansfield* expreſſed a doubt of this in *Wyndham* v. *Chetwynd*, 1 *Burr.* 418. any otherwiſe perhaps than by Lord *Hale*'s having left ſome looſe notes behind him, which were afterwards unſkilfully digeſted, 1 *Blac.* 99.

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charged may not afterwards be able to prove, the omiſſion of which would materially vary the promiſe, by turning that into an abſolute promiſe which was only a conditional one: and then it would reſt altogether on the conſcience of the witneſs to aſſign another conſideration in the one caſe, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* ſhould be reduced into writing, by which the conſideration as well as the promiſe would be rendered certain. The authorities referred to by *Comyns*, *Plowd.* 5. *a.* 6. *a.* 9., to which may be added *Dyer*, 336. *b.* all ſhew that the word *agreement* is not ſatisfied unleſs there be a conſideration, which conſideration forming part of the agreement ought therefore to have been ſhewn; and the promiſe is not binding by the ſtatute unleſs the conſideration which forms part of the agreement be alſo ſtated in writing. Without this, we ſhall leave the witneſs whoſe memory or conſcience is to be refreſhed to ſupply a conſideration more eaſy of proof, or more capable of ſuſtaining the promiſe declared on. Finding therefore the word *agreement* in the ſtatute, which appears to be moſt apt and proper to expreſs that which the policy of the law ſeems to require, and finding no caſe in which the proper meaning of it has been relaxed, the beſt conſtruction which we can make of the clauſe is to give its proper and legal meaning to every word of it.

GROSE J. It is ſaid that the parol evidence tendered does not contradict the agreement; but the queſtion is, Whether the ſtatute does not require that the conſideration for the promiſe ſhould be in writing as well as the promiſe itſelf? Now the words of the ſtatute are "that

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no action ſhall be brought whereby to charge the defendant upon any ſpecial promiſe to anſwer for the debt, &c. of another perſon, &c. unleſs the *agreement* upon which ſuch action ſhall be brought, or ſome memorandum or note thereof, ſhall be in writing," &c. What is required to be in writing, therefore, is the *agreement*, (not the promiſe, as mentioned in the firſt part of the clauſe,) or ſome *note or memorandum of the agreement*. Now the *agreement* is that which is to ſhew what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing*. If it were only neceſſary to ſhew what *one* of them was to do, it would be ſufficient to ſtate the *promiſe* made by the defendant who was to be charged upon it. But if we were to adopt this conſtruction it would be the means of letting in thoſe very frauds and perjuries which it was the object of the ſtatute to prevent. For without the parol evidence the defendant cannot be charged upon the written contract for want of a conſideration in law to ſupport it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol teſtimony, when the ſtatute was paſſed with the very intent of avoiding ſuch a charge, by requiring that the *agreement*, by which muſt be underſtood the *whole agreement*, ſhould be in writing.

LAWRENCE J. From the looſe manner in which the clauſe is worded, I at firſt entertained ſome doubt upon the queſtion; but upon further conſideration I agree with my Lord and my Brothers upon their conſtruction of it. If the queſtion had ariſen merely on the firſt part of the clauſe, I conceive that it would only have been neceſſary that the *promiſe* ſhould have been ſtated in writing; but

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it goes on to direct that no perſon ſhall be charged on ſuch *promiſe* unleſs the *agreement*, or ſome *note or memorandum thereof*, that is, *of the agreement*, be in writing; which ſhews that the word *agreement* was meant to be uſed in a ſenſe different from *promiſe*, and that ſomething beſides the mere promiſe was required to be ſtated. And as the conſideration for the promiſe is part of the agreement, that ought alſo to be ſtated in writing.

LE BLANC J. If there be a diſtinction between *agreement* and *promiſe*, I think that we muſt take it that *agreement* includes *the conſideration* for the promiſe as well as *the promiſe* itſelf: and I think it is the ſafer method to adopt the ſtrict conſtruction of the words in this caſe, becauſe it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I ſhould have been as well ſatisfied, however, if, recurring to the words uſed in the firſt part of the clauſe, they had uſed the ſame words again in the latter part, and ſaid, "unleſs *the promiſe* or *agreement* upon which the action is brought, or ſome note or memorandum thereof, ſhall be in writing." But not having ſo done, I think we muſt adhere to the ſtrict interpretation of the word *agreement*, which means the *conſideration* for which as well as the *promiſe* by which the party binds himſelf.

Rule diſcharged.

BAINBRIGGE *againſt* HOULTON and Another.

Saturday, April 21ſt.

Affidavits in ſupport of or in anſwer to a rule for ſetting aſide an award made a rule of court under the ſtat. 9 & 10 *W.* 3. *c.* 15. *ſ.* 1. there being no action previouſly brought, nor any cauſe in court, need not be entitled.

UPON ſhewing cauſe againſt a rule which had been obtained on the part of *Bainbrigge*, calling on *Houlton* and another to ſhew cauſe why the award which had been made in their favour, and the ſubmiſſion to which had been made a rule of Court under the ſtat. 9 & 10 *W.* 3. *c.* 15. *ſ.* 1. (without any action brought) ſhould not be ſet aſide, objection was taken by *Garrow* and *Eaſt* to the affidavit of one of the arbitrators made in anſwer to the rule, that it was not *entitled* at all, which it ought to be after a rule niſi granted.

Erſkine, *Balguy*, and *Clarke*, who ſhewed cauſe againſt the rule, contended that this was not neceſſary in a caſe like the preſent, where there was no action brought, and conſequently no cauſe in court. And

The Court, after conſulting the Maſter, held that it was not neceſſary in this caſe that the affidavit either in ſupport of or in anſwer to the rule ſhould be entitled (*a*). And after hearing the affidavit, they

Diſcharged the Rule.

(*a*) The like was ruled in another ſimilar caſe in this term. But where an *attachment* is applied for, for non-performance of the award, the affidavits in anſwer to the rule muſt be entitled *The King* v. ——; though thoſe upon which the rule was obtained need not be entitled, where there was no cauſe previouſly in court. *Bevan* v. *Bevan*, 3 *Term Rep.* 601. But where the reference ariſes from an order of Niſi Prius, there being then a cauſe in court, the affidavits either for a rule to ſet aſide the award, or for an attachment for non-performance of it, are entitled in the cauſe. But after the rule niſi granted for an attachment, the affidavits in anſwer to ſuch rule muſt be entitled *The King* againſt ——.

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Monday, April 23d.

WILLIS *againſt* The Commiſſioners of Appeals in Prize Cauſes.

The Prize Court of Appeals has juriſdiction to decree that one who was co-agent of the captors, in whoſe hands the proceeds of the prize after condemnation and ſale were placed, ſhould, after a decree of reſtitution with intereſt pronounced againſt the captors, pay *intereſt* on ſuch proceeds while in his hands to the claimant. And this Court will not grant a prohibition to the Prize Court to reſtrain it from executing ſuch decree, either on the ground that it did not appear on the proceedings below that the agent was a *regiſtered* agent under the ſtat. 33 *Geo.* 3. *c.* 66; becauſe that Court has original juriſdiction *in rem* and its incidents, independent of the ſtatute; nor on the ground that the Court below were reſtrained by the 32d clauſe of the act from decreeing reſtitution of more than the *net proceeds* of the ſale awarded upon condemnation; becauſe *intereſt* made of ſuch *net proceeds* in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that *intereſt* had *in fact* been made by ſuch agent; becauſe that was a fact for the Court below to decide upon, and they muſt be preſumed to have decided on ſatisfactory evidence.

UPON a rule to ſhew cauſe why a prohibition ſhould not go to the commiſſioners of appeals in prize cauſes, to prohibit them for proceeding further againſt Mr. *John Willis*, upon whom as prize agent in a certain cauſe an order had been made for the payment of intereſt on the proceeds of a certain prize which had come to his hands, the ſuggeſtion ſtated that in *June* 1798, pending hoſtilities between *Great Britain* and *France*, Capt. *Weſt* of his Majeſty's ſhip *Tourterelle* had made prize in the *Weſt Indies* of the ſhip *Polly* and her cargo, as *French* property, and had carried the ſame into *Port Royal* in the iſland of *Jamaica*, within the juriſdiction of the Vice-Admiralty Court there, in which Court ſhe was libelled as prize, and condemnation prayed. That upon monition iſſued certain claims were interpoſed on behalf of different ſets of owners, *Britiſh* ſubjects, ſome of which were allowed, and ſuch parts of the cargo were acquitted, and reſtitution awarded; and the remainder of the cargo was adjudged good and lawful prize; and that the ſame ſhould be forthwith ſold by the agents of the captors, and the ſale-money be diſtributed amongſt the captors, &c.

From which ſentence of condemnation the claimant appealed, which appeal was allowed on the uſual terms. And thereupon it was further ordered by the Court, that a warrant of appraiſement ſhould iſſue to value and ap-

praiſe

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praiſe the ſeveral goods condemned, and upon the return of the ſaid appraiſement that the agent for the captors *ſhould enter into good and ſufficient ſecurity to account for and pay over the net proceeds thereof, and alſo the amount of the ſpecie condemned as aforeſaid, as that Court ſhould thereafter direct in caſe the ſentence appealed from ſhould be reverſed.* That the captors appointed *B. Waterhouſe* of the iſland of *Jamaica*, merchant, to be their agent for and relating to the ſaid prize: and that he had duly and within the limited time exhibited and regiſtered in the ſaid Vice-Admiralty Court his letters of attorney, appointing him agent for the purpoſes aforeſaid, according to the form of the ſtatute. That at the return of the ſaid appraiſement ſuch ſecurity as aforeſaid was duly entered into by two good and ſufficient ſureties on behalf of the captors, to anſwer the ſaid appeal. That the goods condemned were, on the 20th of *September* 1798, ſold by public auction, purſuant to the ſtatute, and netted, after payment of all expences, 4552 *l.* 1 *s.* 7 *d.* That an appeal was afterwards made to the commiſſioners, &c., who on the 29th of *June* 1801 reverſed the decree of condemnation, and retained the claim for the general cargo, and decreed the ſame to be reſtored, or the value thereof paid to the claimant for the uſe of the owners: and aſſigned the ſaid captors to bring in the account ſales of the ſame on oath, and the proceeds thereof within a month; which account ſales and proceeds were afterwards duly brought in accordingly: and *condemned the captors in intereſt from the time of the ſale of the ſaid general cargo*, and in the coſts of the then hearing. That on the 4th of *Auguſt* 1802 the commiſſioners of appeals, at the petition of the claimant, decreed a monition againſt *J. Willis* and *B. Waterhouſe, as the captor's agents*, to appear before the commiſſioners,

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and *ſhew cauſe why they ſhould not pay intereſt upon the ſaid proceeds.* And on the 14th of *July* 1803, *J. Willis* being moniſhed, appeared in the ſaid court of appeals, holden before the Right Hon. the Earl of *Roſslyn*, Sir *William Grant* Kt., Sir *William Wynne* Kt., Sir *William Scott* Kt., and others, and ſhewed cauſe, as required; and although the ſaid *J. Willis* was not any party to the ſaid ſuit, appeal, and proceedings, or any of them, or in any way concerned or intereſted in the adjudication of the ſaid prize, nor connected therewith *otherwiſe than* as being the general partner in trade with the ſaid *B. Waterhouſe*, the agent of the captors as aforeſaid; and although the ſaid monition was founded on no ſpecial or other ſuggeſtion on the part of the claimant, than that *J. Willis* and *B. Waterhouſe* were the agents for the captors; and although *J. Willis* was not by law, nor ought to be ſubject to the payment of intereſt on ſuch proceeds in conſequence of that character; and although *J. Willis* and *B. Waterhouſe*, or either of them, never were in any manner called upon prior to the determination of the ſaid appeal by the ſaid court of appeal as aforeſaid to pay over the ſaid proceeds or any part thereof, and the ſame or any part thereof never were or was improperly withheld from the juriſdiction of that court, or of the ſaid Court of Vice-Admiralty, or from the party entitled to the poſſeſſion thereof; and although the ſaid general cargo, having been ſo condemned at *Jamaica*, became veſted in the captors upon bail being given to anſwer the ſaid appeal as aforeſaid, and was accordingly ſold by *B. Waterhouſe*, the acting agent of the captors, who having collected the proceeds of ſuch ſale, after payment of the expences, continued to hold the ſame as an agent or banker uſually holds monies committed to his care or cuſtody, and liable

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to be called for at any moment, (that is to ſay) involved and mixed with other monies then alſo entruſted to him and held in depoſit or otherwiſe; no judicial or other order having been made or given by any court or by the captors for veſting or laying out the proceeds at intereſt or for otherwiſe diſpoſing of the ſame with a view to make a profit thereof; and whereas no ſpecial application, inveſtment, or diſpoſal of the ſame was ever made for the uſe or benefit of the captors or any of them, or of *J. Willis* and *B. Waterhouſe*, or either of them, and no ſpecific profit or advantage which could be ſet forth or aſcertained had at any time been derived therefrom; and although as ſoon as the decree of reſtitution was made known to *B. Waterhouſe*, he immediately cauſed the ſaid proceeds to be paid to his Majeſty's proctor, who brought the ſame into the regiſtry of the court of appeals on the part of the captors, and *J. Willis* never had any power, cuſtody, control, or management over the proceeds, or any part thereof, but the ſame remained with *B. Waterhouſe* in *Jamaica* in manner aforeſaid; and although the Lords Commiſſioners had no juriſdiction or authority whatſoever by the laws of this realm to condemn *J. Willis* to pay intereſt on the ſaid proceeds, or any proceeds of the ſaid general cargo, nor to enforce him to pay the ſame; and although *J. Willis* inſiſted upon all the premiſes before the Commiſſioners of Appeals, and offered to verify the ſame, yet they refuſed to admit the ſame, and decreed intereſt to be paid by *J. Willis* upon the proceeds of the ſaid general cargo from the time of the ſale thereof.

The rule was obtained in the laſt term, on the ground that the act of the 33 *Geo.* 3. *c.* 66. (*ſ.* 23, 24. 28. 32.) which regulated matters of prize and prize agents, gave

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no authority to the prize courts in this caſe to decree intereſt to be paid by prize agents, and that no ſuch authority was given by any other ſtatute or law.

Gibbs and *Steven* ſhewed cauſe againſt the rule. This being after the order of the Court of Appeals made, the only ground for a prohibition muſt be the want of juriſdiction in the Commiſſioners to make it. But, firſt, ſuppoſing that that Court had no juriſdiction over prize agents whoſe powers of attorney were not regiſtered under the 51ſt ſection of the ſtat. 33 *Geo.* 3. *c.* 66., ſtill it was a queſtion of fact, Whether Mr. *Willis* were or were not a regiſtered agent? which it was competent for the Court below to decide; and after ſentence it muſt be preſumed, if neceſſary, that the affirmative was proved; and that concluſion, if unfounded, can only be queſtioned in a court of appeal. All ſuch agents are, by the 59th ſection, required to *account* in the Court of Admiralty before the diſtribution of the prize money, and that Court is to confirm or diſallow the accounts upon objections ſtated, and "to make ſuch further order touching the ſaid accounts as the caſe may require." This would give juriſdiction to the court of prize on appeal to direct the allowance of intereſt, if it thought fit; there being no negative words to reſtrain the general authority before given in this reſpect. It is not even objected by the ſuggeſtion that the Court of Appeals had no juriſdiction to compel *Waterhouſe*, the regiſtered agent, to pay intereſt: but *Willis*'s caſe is endeavoured to be diſtinguiſhed from his, as not being the agent of the captors, which nevertheleſs is in effect admitted by a negative pregnant; for it is alleged "that *Willis* was not party to the proceedings, or intereſted in the adjudication of the prize, nor connected therewith

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otherwiſe than as being the general partner in trade with *Waterhouſe*;" which ſhews that the queſtion made before the Court of Appeals was as to the fact of *Willis*'s agency. This was the very point decided by the Lord Chancellor in the caſe of the *Daniſh* ſhip *Noyſomhed* (*a*). There a cargo condemned as prize by the Vice-Admiralty Court at *Tortola* was ſent to *Chorley* at *Liverpool*, and ſold by him for the benefit of the captors. Afterwards the Court of Appeal reverſed the ſentence and decreed reſtoration, and that the captors ſhould bring in an account of the proceeds within a month; under which a monition iſſued againſt *Chorley*; who moved for a prohibition on the ground that the property was conſigned to him, *not as prize agent, but as a general merchant*, and that he had ſince accounted for the proceeds to the conſignors. But the Lord Chancellor thought that a queſtion proper for the Court of Admiralty to decide, as incidental to the principal queſtion of prize; and that therefore he was not authorized to grant a prohibition. They alſo obſerved that the only affidavit made in ſupport of the ſuggeſtion was to verify the proceedings in the prize court, and therefore it was irregular to introduce any extraneous fact into the ſuggeſtion, ſuch as that *Willis* was not a co-agent with *Waterhouſe*, if that were now to be inſiſted on. But, 2dly, The Court of Appeals has a general juriſdiction *in rem* in matters of prize, independent of the ſtat. 33 *Geo.* 3.; and may follow the prize or its proceeds into whatever hands they may get, and compel the holder to account for thoſe proceeds: and it is to be preſumed after decree that *Willis* was proved before the Court of Appeals to have made intereſt of the prize money in his hands, in whatever character it came to him; and then the

(*a*) 7 *Vef. jun.* 593.

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Court, which has juriſdiction over the principal, has juriſdiction alſo over all its incidents, one of which is intereſt; and ſuch intereſt, when proved to be made, is part of the *proceeds* of the prize, and may therefore be directed to be paid over. In *Smart* v. *Wolfe* (*a*), *Buller* J. ſaid, that every caſe which he knew on the ſubject was a clear authority to ſhew that queſtions of prize and their conſequences were ſolely and excluſively of the Admiralty juriſdiction. And that after the caſes of *Lindo* v. *Rodney* (*b*), *Le Caux* v. *Eden* (*c*), and *Livingston* v. *M'Kenzie* (*d*), it would only be a waſte of time to enter into reaſons to ſhew that this Court has no juriſdiction over thoſe ſubjects. [Lord *Ellenborough* C. J. There is no doubt but that a prohibition will go to a Prize Court, if it clearly exceed its juriſdiction. If we do not grant prohibitions in matters of prize, it is becauſe of the objection ariſing out of the ſubject-matter, and not in reſpect of the Court. The queſtion made by the plaintiff's counſel was upon the act of parliament, Whether the Court of Appeals had juriſdiction to grant intereſt? or whether it be not reſtricted to the *net proceeds* in any decree for reſtitution againſt the captors or their agents, according to the proviſions of the 32d ſection?] That ſection meant merely to provide a rule for eſtimating the value of the prize itſelf at the time of the ſale, the net proceeds of which it directs ſhall be deemed and taken to be the *full* value of the prize. But that does not reſtrain the general authority of the Court, to which the ſtatute was only auxiliary.

Erſkine, *Park*, and *Richardſon*, in ſupport of the rule. This is the firſt inſtance of intereſt decreed to be paid

(*a*) 3 *Term Rep.* 344.
(*b*) *Dougl.* 591. n. 1.
(*c*) *Ib.* 572.
(*d*) 3 *Term Rep.* 332, 3.

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upon prize money, except againſt the captors themſelves, and that by way of puniſhment for miſconduct. In *Le Caux* v. *Eden* (*a*) the Court of Admiralty condemned the captor in *damages* as well as coſts. [*Lawrence* J. If it be admitted that that Court may condemn the captors in intereſt by way of damages, is it not matter of fact whether the agents have that intereſt in their hands which has been awarded?] Then the decree of intereſt ſhould have been againſt the captors: but after the decree againſt them, condemning them in intereſt, a monition has iſſued againſt *Willis*, a third perſon, calling upon him to ſhew cauſe why he, together with *Waterhouſe*, ſhould not pay intereſt upon the proceeds as the captors' agents, which the captors had been before decreed to pay. But the ſtat. 33 *Geo.* 3., which gives juriſdiction to the Admiralty Court over the captors' agents, has provided expreſsly (*ſ.* 32.) that "in caſe ſentence ſhall be finally reverſed, "after ſale of any ſhip or goods purſuant to the direc- "tions in this act contained, the *net proceeds* of ſuch ſale "(after payment of all expences attending the ſame) *ſhall* "*be deemed* and taken to be the *full value* of ſuch ſhip and "goods, and that the parties appellate and their ſecurities "*ſhall not be anſwerable* for the value *beyond the amount of* "*ſuch net proceeds*, unleſs it ſhall appear that ſuch ſale "was fraudulent or without due care." The 28th ſection had before provided "that the execution of any ſen- "tence appealed from ſhall not be ſuſpended in caſe the "parties appellate ſhall give ſecurity to reſtore the *ſhip*, "&c. *or effects* or the *full value* thereof, in caſe the ſen- "tence ſhould be reverſed." The bail, therefore, are put in the place of the thing itſelf; and the act of parliament has declared what ſhall be deemed the full value of the

(*a*) *Dougl.* 501. n. 1.

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thing, viz. the *net proceeds*, and that the parties ſhall not be anſwerable *beyond* ſuch net proceeds. Admitting, therefore, that the Admiralty Court has an original juriſdiction *in rem*, yet here the ſtatute has ſubſtituted the *net proceeds* pro re. [Lord *Ellenborough* C. J. The act has only ſaid that they ſhall not be liable for the value of the thing itſelf beyond the net proceeds of the ſale; but it does not ſay that they ſhall not be liable for the beneficial uſe or product which they make of that value while in their hands.] The form of the ſecurity is given in a note to *Brymer* v. *Atkins* (*a*), and it is conditioned to *reſtore* the ſhip and cargo, or the *value* thereof, in caſe the ſentence ſhould be reverſed. Since this tranſaction took place more extenſive powers have been conferred by the ſtat. 43 *Geo.* 3. *c.* 160.; *ſ.* 50. of which requires agents, on regiſtering their letters of attorney, to give ſecurity in 5000*l.* to the Court for the due execution of their truſt in all matters of prize agency; and *ſ.* 62., looking as it were to the very caſe of making intereſt of prize money, has empowered the Judge of the Court whoſe ſentence is appealed from "to aſſign the agents, or other perſons in "whoſe hands the proceeds of the prize may have come, "at the prayer of either party, to bring into and leave in "the regiſtry the net proceeds of the ſales of ſuch prize, "&c. which ſhall be depoſited in the Bank of *England*, "or in caſe the parties ſhall agree thereto, in ſome public "ſecurities at intereſt," &c. Even this proviſion is ſhort of what is now contended for; for it only provides for making intereſt in future, at the prayer of either party, from the time of appealing; whereas the Court of Appeals has aſſumed to give intereſt as from the time of the ſale by a collateral and ſubſequent proceeding; and that

(*a*) 1 *H. Blac.* 194.

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too without any allegation that intereſt had been made by the agent, decreed to pay it. The Court of Appeals was functus officio after the decree againſt the captors, unleſs there were ſome new proceeding originated againſt the agents, nothing of which is ſuggeſted. But intereſt is either ſomething ariſing out of a contract of lending, or ſomething given by way of damages for miſconduct. Now as a *contract*, the prize court could have no juriſdiction over it; and indeed no contract can be preſumed between the agents of the captors and the captured, at whoſe prayer the monition iſſued. And as a puniſhment, the prize courts only give damages for the miſconduct of the captors, in making the capture, to which their agents, as ſuch, can be no parties; neither is any miſconduct imputed to them. [*Groſe* J. I conſider the intereſt to have been given as part of the *proceeds* of the prize. Lord *Ellenborough* C. J. We muſt preſume that intereſt has been given upon the beſt ground; namely, upon proof that the agents made intereſt of the proceeds of the prize in their hands; and then it cannot be conſidered as given by way of *puniſhment*.] Then the maxim applies reſpondeat ſuperior (*a*). But the intereſt cannot be conſidered as *proceeds*; for the proceeds were before decreed to be brought into court by the captors, which it is alleged has been done. Then with reſpect to this application coming after ſentence; no objection ariſes on the final ſentence, but on this collateral order; and therefore the application was made as ſoon as the grievance exiſted. And in *Gare* v. *Gapper* (*b*) the Court directed the plaintiff to declare in prohibition, which is ſtill pending, in order to have the queſtion well conſidered, whether if the eccleſi-

(*a*) *Sadler* v. *Evans*, 4 *Burr.* 1985. (*b*) 3 *East.* 480.

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aſtical court miſconſtrue an act of parliament a prohibition will not lie even after ſentence.

Lord ELLENBOROUGH C. J. This prohibition is applied for on a ſuppoſed want of juriſdiction in the Court of Appeals to decree intereſt to be paid by prize agents on the proceeds of a cargo in their hands from the time of the ſale under a prior ſentence of condemnation as prize. It is clear that that Court has juriſdiction *in rem*, and may take into its poſſeſſion the thing itſelf or the proceeds wherever they may be found, either in the hands of the principal captor, or agent, or of any other who has no lawful title to hold them. Here the agents have been fixed with the proceeds. It is, however, objected that intereſt derived out of thoſe proceeds cannot be decreed. It is not diſputed but that intereſt may be decreed againſt the captors; but not, as it is urged, againſt an agent; becauſe he is only reſponſible on his ſecurity for the amount of the *net proceeds* of the ſale, and that even as againſt the captors themſelves it is only given by way of damages for miſconduct, for which the agent is not anſwerable. To be ſure the decree of intereſt cannot be brought forward here as matter of *puniſhment* againſt the agent, againſt whom there is no ſubſtantive charge of miſconduct. Neither is it brought forward as on the ground of *contract*; but ſimply on the ground that the *res*, the proceeds, have got into the hands of the agents, and have there grown and accumulated, producing the intereſt now ſought to be recovered. In many inſtances it happens that one who has got the fund of another in his hands, and is proved to have made intereſt of it, ſhall be reſponſible in equity for ſuch increaſe. Then it is ſaid that no intereſt appears to have been made of the proceeds by the agents.

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But we muſt give credit to the Court below for having exerciſed its juriſdiction ſoundly, and that it was ſufficiently proved to it that intereſt had been made. And though it may be a new proceeding in theſe courts to compel an agent, who has made intereſt of the proceeds of a prize in his hands, to render it to thoſe to whom it is due, it is high time that it ſhould be done. For it would be an enormous defect of juſtice when the captor is liable, on the reverſal of a ſentence of condemnation, to be called upon to render intereſt who has not had the proceeds in his hands in the interval, that the agent who has held them, and has derived all the benefit, ſhould not be anſwerable. I am therefore clear upon principle, that though the parties appellate and their ſureties be only made liable under the 32d ſection of the act for the value of the prize to the extent of the net proceeds of the ſale, yet that the captors are liable for intereſt upon ſuch net proceeds, and ſo are their agents and thoſe into whoſe hands the res or proceeds have come. It does not appear here that the agents have not made intereſt of the money in their hands, and we muſt conclude that the Court of Appeals was properly ſatisfied that they had. The only queſtion for us to conſider is, Whether intereſt is to be deemed part of the res or proceeds in the hands of an agent? which I am ſatisfied that it may well be.

GROSE J. It is admitted that the Court of Appeals had juriſdiction over the *rem*, and every thing incident to it. The law is clear, as laid down by Mr. Juſtice *Buller* in the caſe referred to of *Smart* v. *Wolff* (*a*), that the Admiralty Court has juriſdiction, not only over the queſtion

(*a*) 3 *Term Rep.* 345, &c.

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of prize, but of all its conſequences: and that though it has taken a ſtipulation, it is not confined to proceed on that alone, but may alſo proceed *in rem* according to its ancient courſe. Then what is the *res?* The prize or what it produces: *intereſt* is part of the res; it is an incident to it. It is clear that the Prize Court has juriſdiction over what the act calls the *proceeds;* and money is the proceeds, and intereſt is the product of money and part of the proceeds. I am glad to find the proviſion referred to in the late act of parliament for directing the proceeds to be laid out in public ſecurities: not that it furniſhes any doubt of the power of the Court to decree intereſt before; but becauſe it ſecures the claimant's money, as it was intended to do, againſt the inſolvency and miſmanagement of agents. But it is ſaid that *Willis*, not being a regiſtered agent, was not within the juriſdiction of the Court: but he had the proceeds of the prize, the money, in his hands, and that Court had juriſdiction over him, as it had over the money. Then it is urged that *intereſt* is treated as diſtinct from the *proceeds* in the ſuggeſtion: but the *proceeds* decreed by the Court to be brought in meant the proceeds as they exiſted at the time of the ſale of the cargo: and the *intereſt* is what was made afterwards, and which afterwards increaſed the amount of thoſe proceeds. Then if the captor be liable to intereſt beyond the original proceeds, ſo is the agent who has received them into his hands.

LAWRENCE J. It is ſuppoſed that the prize court has juriſdiction over the agent only under the prize acts; but that is not ſo: for if thoſe acts had never been paſſed that Court would have had juriſdiction over the *res*, and the proceeds of it, into whoſever hands they get. The queſtion then is, Whether *intereſt* be not a part of the proceeds?

ceeds? which I take it clearly to be. But it is ſaid that by the 32d ſection of the ſtat. 33 *Geo.* 3. the parties ſhall not be liable, in caſe of the reverſal of a ſentence of condemnation, beyond the *net value* of the proceeds *at the time of the ſale* of the prize. The meaning, however, of that ſection was that the captors ſhould not be charged with the value of the prize beyond the amount of what it *then* produced. But that does not ſhew that if the proceeds, of whatever given value at the time of the ſale, be afterwards made productive, the parties in whoſe hands they are ſhall not be liable for that product. Then it is ſaid further, that intereſt is not alleged to have been made. But in *Smart* v. *Wolffe*, upon a ſuggeſtion that the party decreed to bring in the produce had not the proceeds, Mr. Juſtice *Buller* ſaid that if ſuch were the fact, it ſhould have been pleaded below. So here, if the agents had not made intereſt of the money in their hands, they ſhould have inſiſted on it below. They do not, however, even now, ſuggeſt that no intereſt was made by them; they only argue that as *Waterhouſe* only held the proceeds "as an *agent or banker* uſually holds monies committed to his care, and liable to be called for at any moment, that is to ſay, mixed with other monies alſo entruſted to him, and held in depoſit or otherwiſe," therefore they ought not to be liable to pay intereſt. It is, therefore, rather an admiſſion that intereſt was made. And it does not ſignify how it was made if made in fact. It is an accretion to the principal proceeds. If the agents had ſhewn to the Court below that they had put the prize-money in a cheſt and had made no intereſt of it, I do not ſay that the Court ought to have decreed them to pay it. It has not been decreed againſt them as a puniſhment for miſconduct; for then there ſhould have been a ſubſtantive

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charge of such misconduct; neither is interest directed to be paid on the ground of any supposed contract, but merely as part of the proceeds. And as to the objection that it is not formally alleged that interest was made by the agents, we cannot say how far the practice of the prize court may require such an allegation: it is the best judge of the regularity of its own proceedings. It is enough for us that it has jurisdiction to decree interest in this case. And there is the less reason to direct the plaintiff to declare in prohibition for the purpose of considering the question more fully, because if he be not satisfied with our opinion, he is not estopped from taking that of other courts in *Westminster Hall.*

LE BLANC J. It is admitted that *Willis* and *Waterhouse* are, or *Willis* alone is, subject to the ordinary jurisdiction of the prize court, as being parties in whose possession the *res* is. Then, in order to ground the application for a prohibition it should appear either that they are called upon for something beyond the *res*, or that the jurisdiction of the prize court is limited in this respect by the act of parliament. And it is contended that even if interest were shewn to have been made by the agent he would not be liable; because, as it is said, admitting the agent to be liable for the proceeds in his hands, the act of parliament has defined what those proceeds are, namely, *the net proceeds of the sale at the time.* Then taking the agent to have made interest of these net proceeds, the question is, Whether he be liable to account for it as part of such proceeds? The object of the 32d clause was to lay down a certain rule for ascertaining the full value of the prize to be reimbursed to the claimant in case sentence of condemnation should be finally reversed

after a sale had been directed pursuant to the act; for which purpose it provides that the *net proceeds* of such sale shall be deemed and taken to be *the full value* of the prize, and that the parties appellate and their securities *shall not be answerable for the value beyond the amount of such net proceeds*. But the evident meaning of that is, that the original value of the prize shall not be estimated beyond what it actually produced at the time of the sale under the act. The *proceeds* then are that which was then made, together with that which has been since made out of those proceeds. We cannot enter into the question whether or not the agent has made interest of the money in his hands; but according to what is stated, it is rather to be collected that he had: because the objections made by *Wills* is, not that no interest was in fact made by him and his co-agent *Waterhouse*, but that he was not by law subject to the payment of interest on the proceeds in their hands in consequence of their character as agents; and that the property of the cargo after condemnation was vested by law in the captors, upon bail being given to answer the appeal; and the proceeds collected by *Waterhouse* as their acting agent was holden by him as a banker, &c., and that there was no *special* investment of the amount for the use of the captors, and no *specific* profit which could be set forth had been derived therefrom. But the same might be said by any banker in whose hands money is deposited, and which is mixed with the general mass of his property. Then taking interest to have been made, I consider it as composing part of the *proceeds* at the time when the agent was admonished; for I consider the *proceeds* as including interest made of the net amount of the sale from the time when it is received by the agent till he is called upon to pay it. The object of the provision

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ſtated from the ſtat. 43 *Geo.* 3. was not to enable the Court to direct the payment of intereſt, but to take the principal entirely out of the hands of the agent, and place it on ſecurity where it would neceſſarily produce intereſt; clearly looking to the event that the agent might become inſolvent before a decree of reſtitution could be had. Conſidering, therefore, that the agent here was liable for the *proceeds* of the prize; that thoſe proceeds are compoſed of the original net ſum for which the prize ſold, together with the intereſt which has been made of it while remaining in the agent's hands till called for; and that the Court below had juriſdiction to decide whether or not intereſt ſhould be paid by ſuch agent; and they having decided that it ſhall; there is no ground for a prohibition.

Rule diſcharged.

Monday, April 24th.

Ex parte JOHN LANDSDOWN.

The Court will not, at the prayer of the maſter, grant a habeas corpus to bring up an apprentice impreſſed, he being willing to enter into the king's ſervice

MARRYAT moved for a writ of habeas corpus to bring up the body of *John Landſdown*, an apprentice (one who was protected from being impreſſed by the ſtatute 13 *Geo.* 2. *c.* 17.) who had been impreſſed and taken on board one of the king's ſhips. But he ſtated that this application was made on behalf of the maſter; the apprentice himſelf being willing to enter into the king's ſervice.

Lord ELLENBOROUGH C. J. The writ of habeas corpus is for the protection of the perſonal liberty of the ſubject. If the party himſelf, being of competent years of diſcretion, do not complain, we cannot iſſue the writ

on the prayer of the maſter, who has his remedy by action if his apprentice have been improperly taken from him (a).

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The other Judges concurred, and two of them obſerved that of late years ſimilar applications had been repeatedly refuſed to be granted.

Writ denied.

(a) *Eades* v. *Vandeput*, *M.* 25 *Geo.* 3. *B. R.*—This was an action againſt the captain of a ſhip of war by the maſter of an apprentice, to recover wages for the ſervice of his apprentice, who, having been impreſſed, was detained on board the defendant's ſhip. The only witneſs to charge Captain *Vandeput* with knowledge was the apprentice boy himſelf, who ſwore that after he had been impreſſed and carried on board the ſhip he told the defendant, the captain, that he was an apprentice, and required his diſcharge, which was refuſed. The plaintiff having recovered a verdict before *Buller* J. at the ſittings after the laſt term at *Guildhall*,

Erſkine moved for a new trial, grounded on affidavits of Captains *Vandeput* and *Ormaney* of the navy, which ſtated that, according to the cuſtom of the navy, if an apprentice be preſſed he muſt ſend his indentures to the Admiralty, or bring evidence of them to the captain of the veſſel on board of which he is taken. And here he obſerved that the boy had never ſhewn his indentures, and that if a captain were to diſcharge a boy on his bare word that he was an apprentice, every boy on board his ſhip when he was tired of the ſervice would make that excuſe.

The Court, however, were of opinion that the evidence was ſufficient, and that the captain ought to have made inquiry into the truth of what the boy ſaid; for after that information he detained him at his peril; and it was admitted that if the indentures had been produced the defendant would have been bound to have diſcharged the boy.

Rule refuſed

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Wednesday, April 25th.

who is resident on an estate granted to him for lives, in consideration of two guineas fine and a rent, cannot be removed therefrom tho' annually chargeable. But semble he cannot gain a settlement by 40 days' reside ce on his own share under the act. 9 *Geo.* 1, the consideration being under 30*l.*

The KING *against* The Inhabitants of MARTLEY.

TWO justices by an order removed *Wm. Barton*, his wife, and children, by name, from the parish of *Doddenham* to the parish of *Martley*, both in the county of *Worcester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case. On the 25th of *November* 1754 the dean and chapter of *Worcester* granted to *Henry Barton* of *Doddenham*, labourer, (the grandfather of the pauper), a lease of a cottage and garden, called *Agberrow Close*, in *Doddenham*, containing by estimation about half an acre, then in his occupation, to hold to him, his heirs, and assigns, for his own life (he being then 61 years old), the life of his son *Thomas*, aged 18, and the life of his daughter *Susanna*, aged 16, at the yearly rent of 2*s.* 6*d.* Upon these premises *H. Barton* resided till his death, paying to the dean and chapter the yearly rent of 2*s.* 6*d.*; and at his death, leaving no will, he was succeeded in possession by his eldest son *W. Barton*, the pauper's father; who, on the 22d of *July* 1784, died, leaving a will, by which he devised the premises to his wife for life, remainder to *W. Barton*, the pauper. At the time of his father's death the pauper resided in another parish, and continued so resident for about two years afterwards, during which time his father's widow resided on the premises. At the end of the two years the pauper came to reside with his mother on the premises in question, and continued as part of her family till the 2d of *February* 1790, when the pauper having married, his mother demised the premises to him for her life, at the yearly rent of 1*l.* 11*s.* 6*d.*, and went

to

to reſide elſewhere, leaving the pauper in the ſole occupation of the premiſes. *T. Barton*, the ſecond life named in the leaſe, died on the 27th of *Auguſt* 1795. On the 13th of *July* 1798 the mother of the pauper, who was the tenant for life under the will of the pauper's father, died. The pauper having continued in poſſeſſion from the death of his mother, on the 26th of *November* in the ſame year the dean and chapter, on the application of the pauper, and on payment by him of a fine of two guineas, granted a new leaſe of the premiſes in queſtion at a new rent of one ſhilling, to hold to the pauper, his heirs and aſſigns for three new lives, which are ſtill exiſting. The Seſſions found that at this time all the lives in the firſt leaſe were extinct; *H. Barton*, the original leſſee, and his ſon *Thomas*, having died in *Worceſterſhire* as above ſtated, and *Suſanna*, the third life, having been abſent from the country above 30 years, and not having been ſince heard of by her relations. The new leaſe was conſidered as an entire new demiſe and not a renewal of the old one, or in conſideration of the ſurrender of it. Previous to the death of the pauper's father the pauper acquired a ſettlement in the pariſh of *Martley*; but from the time he became poſſeſſed of the premiſes to the preſent time the pauper has conſtantly reſided upon them, and paid not only the yearly acknowledgment of 2*s.* 6*d.* to the dean and chapter of *Worceſter* during the exiſtence of the firſt leaſe, but alſo the yearly rent of 1*s.* reſerved under the new leaſe thereof. From theſe premiſes in *Dodderham* the pauper and his family, having become chargeable to that pariſh, were removed to the pariſh of *Martley*; the new leaſe, of the 26th of *November* 1798, being ſtill in force.

Touchet

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Touchet and *Peake*, in ſupport of the order of Seſſions firſt obſerved that the old leaſe was at an end before the pauper's intereſt under the new leaſe commenced; for two of the lives were found to be extinct prior to 1796; and when the new leaſe was granted to the pauper in 1798 the third life under the old leaſe had not been heard of for 30 years, and conſequently by reference to the ſtatute 19 *Car.* 2. *c.* 6., muſt be preſumed to have died after the expiration of the firſt ſeven years, no proof being made to the contrary. Then no ſettlement could be gained under the new leaſe, when the pauper lived on the eſtate in his own right; the purchaſe having been made by the pauper himſelf for a conſideration under 30*l.* in value. And though it may be ſaid that this was a voluntary grant of the dean and chapter, and not a purchaſe for a pecuniary conſideration; yet, according to *Rex* v. *Warburton* (*a*), the conſideration need not be in money paid at the time in order to bring the purchaſe within the ſtat. 9 *Geo.* 1. *c.* 7. *ſ.* 5.; for there a grant of a copyhold with 1*s.* fine, 1*s.* heriot, and 1*s.* rent, was holden to be a purchaſe within the ſtatute, which could not confer a ſettlement. And here is a fine of two guineas, and a 1*s.* rent. [Lord *Ellenborough* C. J. There would be no difficulty in deciding that this was a purchaſe under 30*l.* within the ſtatute. But admitting that; and preſuming the third life under the firſt leaſe to be extinct; ſtill, how can this order removing the pauper from *his own eſtate* be ſupported? This is an objection, diſtinct from the queſtion of the ſettlement.] In anſwer they obſerved that this objection had not been made below. That here the pauper was actually charge-

(*a*) 1 *Term Rep* 241.

able

ble before the order of removal, which differed it from the other cases. Where persons were heretofore removed as *likely to become chargeable*, there could be no presumption of consent on their part. But where a man applies to a parish for relief, as here, he must be taken to consent to all things necessary to afford him that relief in the due course of law, and consequently to consent to a removal under an order of justices to the place of his last legal settlement, where he is properly maintainable. Then if he consent, there is no disseisin of his freehold, which is the ground on which the illegality of a compulsive removal from a man's own estate is put by *Foster* J. in *Rex* v. *Aythrop Rooding* (*a*); which, however, was not a case of freehold, but of copyhold. But there the person removed was not chargeable: and though *Foster* J. thought that that would make no difference, yet Lord *Mansfield* and *Denison* J. seem to have been of a different opinion, particularly the former, who said that the wife could not be removed from her husband's property "upon being *only likely* to become chargeable." Then again in *Clypton* v. *Ravistock* (*b*), it was decided that magistrates could not make an order for the relief of a pauper on the parish to which he belonged unless he were within the parish at the time, and as one who is possessed of property within a parish where he resides is not entitled to relief there, as casual poor, but his property must first be applied to his support; it follows that unless he were liable to be removed, he might not be able to obtain present relief for want of a purchaser of such property.

Jervis and *Peller*, contrà, were stopped by the Court.

(*a*) *Burr.* S. C. 412. (*b*) *E.* 11 *Ann. Cal. of Set.* 49.

Lord

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Lord ELLENBOROUGH C. J. If the inference of conſent to the removal, derived from the mere act of applying to the pariſh for relief, be puſhed ſo far, it may as well be argued that the pauper conſented alſo to a conveyance of his property, if that be a ſtep towards entitling himſelf to relief. I cannot think that what fell from Mr. Juſtice *Foſter* in the caſe of *Aythop Rooding*, when he ſaid that the party's right to remain on his freehold was founded on Magna Charta, is to be treated lightly. He was ſpeaking from analogy to the caſe of freehold; the premiſes there being copyhold. But he was not liable to draw compariſons raſhly; and the reaſon of the thing applied equally to both. Here the party, whilſt he reſided on his own eſtate, was not liable to be removed.

GROSE J. was of the ſame opinion.

LAWRENCE J. The power of the juſtices to remove any perſon is founded on the ſtat. 13 & 14 *Car.* 2. *c.* 12. which extends to "any perſon who ſhall come to ſettle in any tenement under the yearly value of 10*l.*;" and theſe words having never been deemed to relate to perſons living on their own eſtates, whether acquired by purchaſe or otherwiſe, or at whatever value; it followed that every perſon reſiding irremoveably for 40 days in the pariſh where his own property was gained a ſettlement: that encouraged perſons to make ſmall purchaſes for the purpoſe of ſettling themſelves in particular pariſhes: and it was to remedy that inconvenience that the ſtat. of 9 *Geo.* 1. was paſſed, which provides that "no perſon "ſhall be deemed to acquire any *ſettlement* in any pariſh by "virtue of any purchaſe of any eſtate or intereſt in ſuch "pariſh,

" pariſh, whereof the conſideration, &c. doth not amount " to 30*l.* &c. *for any longer or further time than* ſuch per- " ſon ſhall *inhabit in* (*a*) *ſuch eſtate*; and ſhall *then* be liable " to be removed," &c.

LE BLANC J. The pauper was not precluded from obtaining relief, becauſe having a ſettlement in another pariſh he might always obtain relief by going there.

Both Orders quaſhed.

(*a*) *Vide Duncburch* v. *South Kilworth*, *Burr.* S. C. 553., and *Rex* v. *Houghton Le Spring*, 1 *Eaſt*, 247.

DEAN *againſt* PEEL.

Wedneſday, April 25th.

An action on the caſe for debauching and getting with child the plaintiff's daughter and ſervant, per quod ſervitium amiſit, is not maintained by evidence that the daughter, though under age, was living in another perſon's family in the capacity of a houſekeeper, and had no intention at the time of the ſeduction to return to her father's houſe, though ſhe afterwards did return there while with in age in conſequence of the ſeduction, and was maintained by her father.

THIS was an action on the caſe for debauching and getting with child the plaintiff's daughter. The declaration ſtated that the defendant, wrongfully intending to injure the plaintiff, debauched and carnally knew *E. D.*, *then being the daughter and ſervant of the plaintiff*, whereby ſhe became pregnant, &c. and diſeaſed, &c. by means whereof the ſaid *E. D.* was rendered *unable to perform* the *neceſſary affairs and buſineſs* of her ſaid father and *maſter*, during all which time *he was deprived of her ſervice*, and was obliged to expend ſo much in nurſing and taking care of her. The cauſe was tried before *Chambre* J. at the laſt aſſizes at *Lancaſter*; when the facts appeared to be that the daughter, who was 19 years of age when ſhe was ſeduced, was then living in the houſe of one *Taylor*, who had before married her ſiſter, a few doors from her father's houſe in *Mancheſter*. *Taylor* kept a public-houſe; and his wife having then lately died, the plaintiff's daugh-

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ter acted as his houſekeeper, and had the care of the bar: but no contract was made with her brother-in-law for wages, either by herſelf or the plaintiff her father, nor did ſhe in fact receive any; and ſhe might have left him when ſhe pleaſed: but while her ſiſter lay dead in the houſe *Taylor* told her that ſhe might take what money ſhe wanted. Finding herſelf with child ſhe returned to her father's houſe, and afterwards lay in there at his expence: and after her removal thither ſhe applied to *Taylor* for wages, who refuſed to pay any. The daughter, by whom the above facts were proved, added, upon her examination, that if this misfortune had not befallen her ſhe had determined not to return to her father's houſe. On this evidence the learned Judge nonſuited the plaintiff, on the ground that there was no ſervice proved to the father at the time of the ſeduction and getting with child: and that the daughter being under age at the time (which was preſſed upon him as diſtinguiſhing this from former caſes) made no difference, particularly as ſhe had no animus revertendi to her father's family.

Topping now moved to ſet aſide the nonſuit and for a new trial, on the diſtinction before taken. In *Pottlethwaite* v *Parkes* (*a*), where the daughter was in another ſervice, ſhe was of full age at the time of the ſeduction; and this ground of objection to the action was inſiſted on as well as the foreign ſervice; and the matter was compromiſed. It is true that in *Bennett* v. *Alcott* (*b*) *Buller* J. ſaid that what influenced the opinion of the Court in the former caſe was that the daughter was in the ſervice of another perſon; but the point has never been judicially decided againſt the father's right to maintain the action

(*a*) 3 *Burr.* 1878. (*b*) 2 *Term Rep.* 166.

where

where the daughter was under age at the time (*a*)." And he referred to the two following cases, where *Wilson* J. at nisi prius had given it as his opinion that if the daughter were *under age* the action was maintainable for her seduction, though she were not living with the father at the time. "*Booth* v. *Charlton*, at *Lancaster* in 1789, cor. *Wilson* J. This was an action by the father against the defendant for assaulting his daughter and debauching and getting her with child, per quod servitium amisit. On evidence it appeared that the daughter, on her first criminal connection with the defendant, was above 21 years of age, but she was living still with her father. The child was born two months after she attained 22. *Wilson* J. said that, according to his memory, the distinction in these cases was, that if the daughter were under the age of 21 the action was maintainable, though she should be upon a visit to or be living with another person her relation. But that if she were of age, the action was maintainable only in case of her living with her father. Verdict for the plaintiff for 15*l*." "*Johnson* v. *M'Adam*, before the same Judge, at the same assizes. This was a similar action to the foregoing. The daughter, from the time of her mother's death, about a year and a half before the seduction, lived with her father, and had the care and superintendance of his family: and while she was so living

(*a*) In the case of *Saterthwaite* v. *Durst*, *E.* 25 *Geo.* 3. *B. R.* upon a motion in arrest of judgment, where the Court held that an action on the case would not lie unless it were laid with a per quod servitium amisit, it was assumed that the daughter was of full age. And Lord *Mansfield* C. J. in delivering the opinion of the Court (after time taken to look into the cases) said that "it appears very extraordinary that any action should lie to a person on account of incontinence between two others, both of whom may be of full age: for it does not appear here that the daughter was not of age."

with

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with him ſhe received an invitation from Mrs. *M'Adam*, the defendant's brother's wife, and in conſequence went on a viſit to her, to keep her company in the abſence of her huſband for three or four months, after which ſhe returned to her father's. Her father was abſent when ſhe left home, and ſhe went to Mrs. *M'Adam*'s without his knowledge or conſent, but ſhe had the conſent of her aunt, who lived in the family, and took the ſuperintendance of it in her abſence. At the time of her leaving her father's, about the beginning of *July*, ſhe was under 21, but attained that age the 2d of *September* following, and at the latter end of *September* was ſeduced by the defendant. Upon her return home ſhe continued under her father's protection and maintenance, and was delivered at his houſe and at his expence, and the child was afterwards maintained by him. Inter alia, it was objected that the action was not maintainable, the daughter being of full age and ſui juris when the ſeduction happened, and not reſident with her father. But *Wilſon* J. ſaid that where the daughter was under age he believed the action was maintainable, though ſhe were not part of his family when ſhe was ſeduced. But where ſhe was of age and no part of the father's family, he thought the action not maintainable. That in *Poſtlethwaite* v. *Parkes* the daughter was of age, and in the ſervice of another family. That this was a middle caſe, and therefore he would reſerve the point. Afterwards, in ſumming up the evidence to the jury, he told them that the conſent of the father to the viſit made by his daughter muſt be inferred from the circumſtances; and that ſhe might ſtill be conſidered as part of his family. Verdict for 500*l.* And no new trial was moved for.

Lord

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Lord ELLENBOROUGH C. J. In thoſe caſes the implied relationſhip of maſter and ſervant continued. But here there was no animus revertendi: the daughter declared on her examination that ſhe had no intention of returning to her father's houſe before this misfortune; and ſhe was actually in the ſervice of another perſon. I think therefore that the opinion of the learned Judge who tried the cauſe was correct.

Per Curiam, Rule refuſed (*a*).

(*a*) Vide *Jones* v. *Brown*, *Peake's N. P. Caſ* 233. and 1 *Eſp. N. P Caſ.* 217., where, in an action for an aſſault on the plaintiff's ſon and ſervant, a lad *under age* and *living with his father*, per quod ſervitium amiſit, the plaintiff's counſel proceeding to prove that he was employed about his father's buſineſs, Lord *Kenyon* C. J. ſaid that ſuch evidence was unneceſſary; If he lived in his father's family and under his protection, it was ſufficient to maintain the action. *Vide* what was ſaid by the ſame learned and noble Judge in *Foret* v. *Wilſon*, *Peake's N. P. Caſ.* 55., and vide *Barham* v. *Dennis*, *Cro. Eliz.* 770.

BELL *againſt* POTTS.

Thurſday, *April* 26th

Where, in caſe, the plaintiff recovered a verdict at the trial and had judgment in C. B., and upon a bil. of exceptions returned into this court judgment was reverſed, and the plaintiff took nothing by his writ, the defendant cannot have coſts.

THIS was an action on a policy of inſurance in the Court of Common Pleas, where there was a verdict for the plaintiff; and a bill of exceptions was tendered at the trial and allowed; upon which, the record being brought into this court, judgment was reverſed. Whereupon the Maſter having taxed coſts for the defendant, as if he had obtained a verdict originally, a motion was made for the Maſter to review his taxation, on the ground that the judgment not being for the defendant, but merely that the judgment for the plaintiff be reverſed, and the plaintiff nil capiat per breve, no coſts could be allowed to the defendant within any of the ſtatutes granting coſts. And

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Gibbs, who was to have ſhewn cauſe, admitted that he could not ſupport the defendant's right to coſts within any of the caſes putting a conſtruction on the ſeveral acts of parliament giving coſts to a defendant; although in the event it appeared that the defendant ought to have had a verdict at the trial, in which caſe he would have been entitled to his coſts, and the plaintiff would have had his coſts if he had ſucceeded.

Wigley in ſupport of this rule.

Per Curiam, Rule abſolute.

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ROE, on the Demiſe of the Right Hon. THOMAS CONOLLY, *againſt* VERNON and VYSE.

Thurſday, April 26th.

THIS was an action of ejectment, on a demiſe laid the 1ſt of *Auguſt* 1802, for the recovery of certain cuſtomary tenements in the manor of *Wakefield*, in the county of *York*, which was tried before *Rooke* J. at the laſt *York* aſſizes; when a verdict was given for the plaintiff, ſubject to the opinion of the Court on the following caſe:

The cuſtomary tenements within the manor of *Wakefield* in the county of *York* are of two ſorts, *compounded*

Where there is a grant of a *particular* thing once ſufficiently aſcertained by ſome circumſtance belonging to it, the addition of an allegation miſtaken or falſe reſpecting it will not fruſtrate the grant: but where a grant is in *general* terms, there the addition of a *particular* circumſtance will operate by way of reſtriction and modification of ſuch grant. Therefore where one having cuſtomary tenements, *compounded* and *uncompounded*, ſurrendered to the uſe of his will "*all* "*and ſingular the lands, tenements*, &c. *whatſoever in the manor, which he held of the lord by copy of* "*court-roll*, in whoſe tenure or occupation ſoever the ſame were, *being of the yearly rent to the* "*lord in the whole of* 4*l.* 10*s.* 8½*d. and compounded for*;" held that the words, "*and compounded* "*for*," reſtrained the operation of the ſurrender to that deſcription of copyholds then belonging to the ſurrenderor. And that the words "*being of the yearly rent, &c. of* 4*l.* 10*s.* 8½*d.*" which were not referable to any actual amount of the rents either compounded or uncompounded, though much nearer to the whole than to the *compounded* only, could not qualify or impugn that reſtriction. Where a teſtator had *freehold*, *cuſtomary*, and *copyhold* eſtates; and after introductory words, as to *all his worldly eſtate*, deviſed two rent-charges out of *all his real* eſtate, and alſo two *copyholds* in *Middleſex* for lives; and ſubject thereto deviſed "all his *freehold* manors, lands, &c. in *Yorkſhire* and other counties, and the reverſion of the two copyholds to his ſon for life, with ſucceſſive remainders in tail male to his firſt and other ſons, with like remainders to other branches in the male line: and in default of ſuch iſſue he deviſed all his "*ſaid* (freehold) manors, land," &c. to his eldeſt daughter in tail male in ſtrict ſettlement, with like remainders to his ſecond and third daughters: and by the reſiduary clauſe deviſed *all other* his manors, lands, &c. either *freehold* or *copyhold* (except thoſe in the counties of *York*, &c. which he had before diſpoſed of), ſubject to the ſaid *rent-charges, in failure of iſſue male of his ſon* and himſelf, to his three daughters, as tenants in common, in fee: held that certain *cuſtomary* eſtates, which the deviſor had, with freehold property in *Yorkſhire*, did not, on failure of the male line, paſs to the eldeſt daughter under the deſcription of all his *freehold* manors, lands, &c. in that and other counties. For, ſuppoſing that the *freehold* of ſuch *cuſtomary eſtates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the cuſtom of the manor*, and the tenants being entitled to the timber and mines, and the eſtates being demiſed and demiſeable in fee ſimple or otherwiſe; yet as they were holden by copy of court-roll, and paſſed by ſurrender and admittance, and were generally reputed and called *copyholds*, and the teſtator having diſtinguiſhed in other parts of his will between *copyhold* and *freehold*, he muſt be preſumed to have uſed the word *freehold* in its uſual and popular ſignification, as not including theſe *cuſtomary* eſtates conſidered by himſelf as *copyholds*; and therefore ſuch cuſtomary eſtates paſſed to the three daughters under the reſiduary clauſe. And it ſeems that as by ſuch reſiduary clauſe the daughters would not take till failure of iſſue male of the ſon and the deviſor; he, the ſon, the heir at law, took an eſtate-tail by implication in the cuſtomary eſtates not before deviſed.

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and *uncompounded*; the *compounded* are liable to *a fine certain* on alienation and deſcent, by reaſon of a compoſition or agreement anciently made with the lord of the manor: the *uncompounded* are thoſe for which no ſuch agreement has been made, and are therefore liable to *a fine arbitrary*, that is, a fine not exceeding two years improved value of the premiſes. *Thomas* Earl of *Strafford*, being ſeiſed in tail male, viz. to him and the heirs male of the body of his father Sir *William Wentworth* deceaſed, (which eſtate is now extinct), with reverſion to himſelf in fee, as eldeſt ſon and heir of his father, of certain cuſtomary tenements, with the appurtenances, in the manor of *Wakefield*, as well *compounded* as *uncompounded*, holden of the lord *by copy of court-roll*, by rents and ſervices, according to the cuſtom of the manor; and alſo ſeiſed of a moiety of certain other cuſtomary tenements in the manor, holden in like manner of the lord, viz. of certain cuſtomary tenements *compounded*, *in fee*, and of certain cuſtomary tenements *uncompounded*, in *tail general*, (which eſtate tail is ſtill ſubſiſting), with reverſion to himſelf in fee; and alſo ſeiſed in fee of certain other *cuſtomary tenements* which *he himſelf had lately purchaſed*; on the 10th of *April* 1732, according to the cuſtom of the manor, made the following *ſurrender* out of court of his cuſtomary tenements, with the appurtenances, to the uſe of his will; "All and ſingular the meſſuages, "dwelling-houſes, cottages, cloſes, lands, tenements, and "hereditaments whatſoever, with their and every of their "appurtenances, ſituate, lying, and being in *Wakefield*, "*Stanley*, *Alverthorpe*, *Thornes*, and *Sandal Magna*, or elſe- "where within the ſaid manor of *Wakefield*, which he "the ſaid earl now holds of the lord of the ſaid manor of "*Wakefield* by copy of court-roll, in whoſe tenures or oc- "cupations ſoever the ſame now are or be, being of the

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" yearly rent to the lord in the whole of 4*l.* 10*s.* 8½*d.* " *and compounded for.*" Which ſurrender was not brought into court till the year 1741, after the death of the ſaid earl, when the ſame was preſented according to the cuſtom of the manor. The ſaid rent of 4*l.* 10*s.* 8½*d. exceeded* the amount of the rents payable to the lord for the *compounded* cuſtomary tenements of the ſaid *Thomas* Earl of *Strafford*; Sir *William Wentworth*, the father of *Thomas* Earl of *S.* having, on his admiſſion in 1672 to the premiſes of which the earl was ſeiſed as aforeſaid, (except thoſe lately purchaſed by him,) paid a fine for his *compounded* cuſtomary tenements only of 3*l.* 15*s.*, being three times the amount of 1*l.* 5*s.*, the lord's rent for the ſame, and a fine of 80*l.* for his *uncompounded* lands. The whole of the rents paid to the lord by *William* Earl of *Strafford* hereinafter mentioned and his ſucceſſors for all the ſaid cuſtomary tenements, both compounded and uncompounded, amounted to 4*l.* 14*s.* 6*d.*, of which ſum 1*s.* 9*d.* was for the rents of the lands purchaſed by *Thomas* Earl of *Strafford*. *Thomas* Earl of *Strafford*, on the 22d of *June* 1732 by his will of that date, duly executed, &c. " As to the worldly eſtate with which it had pleaſed God to bleſs him," in the firſt place deviſed to his wife " out of all his real eſtate in the counties of *York*, *Nottingham*, and *Lincoln*, an annuity of 2000*l.* in lieu of her dower or thirds at common law, which ſhe might otherwiſe claim out of any part of his real eſtate, which he had been or ſhould or might be ſeiſed of at any time during their intermarriage." And after giving her for life all that his *copyhold* meſſuage and garden in *Twickenham* in the county of *Middleſex*, then in his own poſſeſſion, and which he had ſurrendered to the uſe of his will; and after deviſing out of all his real and perſonal eſtate whatſoever to his *Will.*

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mother an annuity of 200*l.* for her life, and the little houſe at *Twickenham* aforeſaid in which ſhe then lived, the ſame being *copyhold*, and ſurrendered to the uſe of his will, in lieu of her jointure, dower, and thirds at common law, and all other demands out of the real and perſonal eſtate of her late huſband his deceaſed father, Sir *W. Wentworth*; the will proceeds thus: "And as to all "my *freehold* manors, meſſuages, lands, tenements, and "hereditaments, in the counties of *York*, *Nottingham*, *Lin-* "*coln*, *Northampton*, *Suffolk*, *Kent*, *Surry*, and *Middleſex*, "or elſewhere in *Great Britain*, ſubject as to the ſaid "premiſes in the ſaid counties of *York*, *Nottingham*, and "*Lincoln*, to the ſaid two ſeveral rent-charges of 2000*l.* "per annum and 200*l.* per annum, ſo hereby reſpectively "deviſed to my ſaid wife and mother as aforeſaid, in "manner as before and after mentioned, and likewiſe "ſubject to all legacies, &c., my perſonal eſtate being "firſt to be applied for that purpoſe, I do give and deviſe "all my ſaid *freehold* premiſes, from my deceaſe, and alſo "I deviſe my two *copyhold* meſſuages in *Twickenham* afore- "ſaid, from and after the reſpective deceaſes of my ſaid "mother and wife reſpectively, unto my only ſon *William* "Lord *Wentworth* for life, without impeachment of "waſte, as to ſuch part of the premiſes as are freehold, "other than voluntary waſte by pulling down *Wentworth* "*Caſtle*," &c.: with ſucceſſive remainders in tail male to the firſt and other ſons of his ſaid ſon *William* Lord *Wentworth*, and afterwards to the ſecond and all other the ſons of the teſtator; and then as follows, "And in "default of ſuch iſſue male of my body, the ſaid two "ſeveral annuities of 2000*l.* per annum and 200*l.* per "annum, inſtead of iſſuing out of my ſaid manors and "lands in the ſaid counties of *York*, *Lincoln*, and *Notting-*

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" *ham*, ſhall, in caſe of my brother *Peter Wentworth* and " the heirs male of his body, be charged upon all the reſt " of my freehold manors, lands, and hereditaments what- " ſoever, and with the like powers of diſtreſs reſpectively " as aforeſaid, and alſo to be charged upon my intereſt in " the grant from the Crown of ſome of the poſt fines. " Provided that in caſe my ſaid other *freehold* premiſes " and poſt fines will not be of ſufficient yearly value to " anſwer the ſaid ſeveral annuities of 2000*l.* per annum " and 200*l.* per annum, that then ſuch deficiency ſhall " be made good out of my ſaid eſtate in the ſaid counties " of *York*, *Nottingham*, and *Lincoln*, ſo deviſed to my " brother. And in caſe of failure of iſſue male of me " and my ſaid ſon as aforeſaid, then I give and deviſe " all ſuch of my ſaid manors, lands, tenements, and he- " reditaments, ſituate in the ſeveral counties of *York*, *Lin-* " *coln*, and *Nottingham*, (being parcel of the premiſes ſo " deviſed to my ſaid ſon as aforeſaid) unto my brother *Pe-* " *ter Wentworth*, for life, without impeachment of waſte " other than voluntary," &c.; with remainder under the like reſtrictions to *William Wentworth*, eldeſt ſon of his ſaid brother *Peter Wentworth* for life; then ſucceſſively to the firſt and other ſons of his ſaid nephew *William* in tail male; then to his nephew *George Wentworth*, ſecond ſon of his ſaid brother *Peter Wentworth* for life; then ſucceſſively to the firſt and other ſons of his ſaid nephew *Geo. Wentworth* in tail male; then to the third and all other the ſons of his ſaid brother *Peter Wentworth* in tail male ſucceſſively. And then he deviſes as follows; " And *in default of ſuch iſſue* I give and bequeath all that " my capital ſeat called *Wentworth Caſtle*, and all *my ſaid* " *manors, meſſuages, lands, tenements, and hereditaments* in " the ſaid county of *York* unto my eldeſt daughter *Lucy*

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" *Ann Wentworth* for life, ſo as ſhe and her huſband (if " ſhe take any) take upon themſelves, within the time " after mentioned, the ſurname of *Wentworth*; with re- " mainder to (truſtees) to preſerve contingent remainders; " and from and after the deceaſe of the ſaid Lady *Ann* " *Wentworth*, or upon her huſband, if ſhe take any, or " her failure of taking upon them the ſurname of *Went-* " *worth*, I give and deviſe the ſaid capital ſeat, manors, " lands, and hereditaments in the ſaid county of *York* " unto the firſt and other ſons of my ſaid eldeſt daughter " Lady *Ann Wentworth* in tail male, ſucceſſively, taking " upon them the ſurname of *Wentworth*;" with remainder under the like reſtrictions to his ſecond daughter *Lady Lucy Wentworth* for her life, and to her firſt and other ſons ſucceſſively in tail male; with remainder under the like reſtrictions to his third and youngeſt daughter *Lady Harriott Wentworth*, and her firſt and other ſons ſucceſſively in tail male. And in default of ſuch iſſue male of all his ſaid three daughters, he deviſed the ſame premiſes in the ſaid county of *York* to his own right heirs for ever. And the teſtator declared the ſaid deviſes to his daughters and their iſſue male to be upon this expreſs condition, that his daughters, their huſbands, and iſſue male, ſhould, within three months after coming into poſſeſſion of the capital meſſuage, manors, lands, and premiſes in the county of *York*, take upon themſelves the ſurname of *Wentworth*, and reſide for three months in every year at *Wentworth Caſtle*, and keep the ſame in good repair; and in default thereof by any, the premiſes ſhould go to the next in remainder on the like conditions. " And as to " all my ſaid manors, lands, and hereditaments in the ſaid " counties of *Lincoln* and *Nottingham*, from and after my " death without iſſue male, and the death of my ſaid bro-

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" ther *Peter Wentworth* without iſſue male I give and de-
" viſe the ſame premiſes unto my three daughters Lady
" *Ann*, Lady *Lucy*, and Lady *Harriott*, and their heirs,
" equally to be divided between them, ſhare and ſhare
" alike, as tenants in common and not as joint tenants.
" And as to all other my manors, meſſuages, lands, tene- *Reſiduary clauſe.*
" ments, and hereditaments whatſoever and whereſoever,
" either *freehold* or *copyhold*, (except thoſe in the ſaid
" counties of *York*, *Lincoln*, and *Nottingham*, which I
" have already ſo diſpoſed of by will), ſubject to the ſaid
" ſeveral rent-charges of 2000*l.* and 200*l.* per annum, and
" the legacies, &c. I give and bequeath the ſame, in fai-
" lure of iſſue male of the body of my ſaid ſon *William*
" Lord *Wentworth*, and of my own body, to my ſaid
" three daughters Lady *Ann*, Lady *Lucy*, and Lady *Har-*
" *riott*, and their heirs, equally to be divided betwixt them
" as tenants in common, and not as joint tenants." The will alſo contained powers to the teſtator's ſon *William* Lord *Wentworth*, and to the teſtator's brother *Peter Wentworth* and his ſons, when in poſſeſſion, reſpectively to leaſe for 21 years, and to jointure a wife out of the premiſes deviſed to him, except *Wentworth Caſtle*; and for his brother *Peter W.*, when in poſſeſſion, to charge 4000*l.* on the premiſes deviſed to him for his daughter *Ann*. The teſtator, *Thomas* Earl of *Strafford*, died in *November* 1739, leaving his ſon *William* Earl of *Strafford*, and his ſaid three daughters, and alſo his nephews *William* and *George*, the only iſſue of his brother *Peter Wentworth*, then deceaſed, of whom *George* is ſince dead without iſſue. *William* Earl of *Strafford* entered upon the ſaid cuſtomary premiſes, and died without iſſue in *March* 1791. Lady *Ann*, the eldeſt daughter of *Thomas* Earl of *Strafford*, married the Right Hon. *Wm. Conolly*. She ſurvived

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vived her huſband and died in *February* 1794, leaving the leſſor of the plaintiff, her only ſon. The defendant *R. W. H. Vyſe* is the grandſon of Lady *Lucy*, the ſecond daughter, alſo deceaſed, by her daughter *Anne*, who married General *Vyſe*, and is ſince deceaſed; and the defendant *Henry Vernon* is the ſon of Lady *Harriott*, the third daughter of *Thomas* Earl of *Strafford*, alſo deceaſed. *Frederick Thomas*, the ſon of the ſaid *William Wentworth*, in *March* 1791, upon the deceaſe of *William* Earl of *Strafford*, became Earl of *Strafford*, and entered upon the ſaid cuſtomary premiſes, and died without iſſue in *Auguſt* 1799, leaving *Auguſta Ann Kaye*, his ſiſter and heir at law, but never was admitted tenant to the ſaid premiſes, or any of them. He alſo, in 1791, ſuffered a recovery of *Wentworth Caſtle* and the other premiſes of *freehold* tenure in the county of *York*, deviſed to him by *Thomas* Earl of *Strafford*. On the 11th of *February* 1802 the leſſor of the plaintiff was admitted at the court baron tenant to the ſaid cuſtomary premiſes under a writ of mandamus; the copy of the admittance ſtating that he as heir male of the body of Lady *Anne* prayed to be admitted tenant, under the ſaid will, to all the *copyhold* meſſuages, lands, &c. within the manor, of which *Thomas* Earl of *Strafford* died ſeiſed; ſtating alſo ſome of them to be of the nature of copyhold *uncompounded for*, and the reſidue to be of the nature of copyhold *compounded for*, and that the ſame were granted by the lord of the ſaid manor to the ſaid *Thomas Conolly*, to hold to him and the heirs male of his body, according to the limitations of the ſaid will, to be holden of the lord of the ſaid manor by the rents, fines, ſuits, and ſervices, *according to the cuſtom thereof*. On the 20th of *February* 1802 the leſſor of the plaintiff, according to the cuſtom of the ſaid manor, ſuffered a recovery of the *com-*

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pounded part of the ſaid cuſtomary premiſes to which he had been ſo admitted. *Wentworth Caſtle*, of which *Thomas* Earl of *Strafford* was ſeiſed in fee at the making of his will and at his death, is of *freehold* tenure, and is ſituate near ten miles from ſome part of the manor of *Wakefield*, and from that to 14 miles from other parts. There is alſo an old manſion-houſe at *Wakefield* of *freehold* tenure, belonging to the *Strafford* family, and alſo a cloſe of land adjoining thereto of three acres, alſo of *freehold* tenure, of which *Thomas* Earl of *Strafford* was ſo ſeiſed. The land adjoining to the manſion-houſe is claimed by the Duke of *Leeds*, as *uncompounded*. The manor of *Wakefield* was of ancient demeſne of the Crown of *England*, and the ſaid cuſtomary premiſes, as well as the other cuſtomary tenements within the manor, from time immemorial have been and are *demiſed and demiſeable* by *copy of court-roll*, by the lord or his ſteward, to any perſon willing to take the ſame in fee ſimple or otherwiſe, according to the cuſtom of the manor; being always *called and reputed to be copyhold*; but none of the grants or admittances ſtate that the tenant is to hold *at the will of the lord*. In the reign of *James* I., about the year 1607, an information was exhibited by the Attorney-General of the duchy of *Lancaſter* on behalf of his Majeſty againſt a great many of the tenants of his Majeſty's manor of *Wakefield*, (982 in all,) whereby they were mentioned to be *copyholders* of the ſaid manor; and that the greateſt part of the lands within the ſaid manor were *copyhold* lands, parcel of the ſaid manor, *demiſed and demiſeable by copy of court-roll* to any perſon or perſons willing to take the ſame in fee ſimple or fee tail, or for term of life or lives, *at the will of the lord*, according to the cuſtom of the manor, at and for fines uncertain at the will of the lord or his ſteward,

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to be paid to the lord upon every grant or admittance thereof: but ſtating that the tenants pretended that by the cuſtom the fines were not arbitrary, but certain, viz. "For every admittance by ſurrender or deſcent to any "eſtate of inheritance in poſſeſſion, according to the cuſ- "tom of the ſaid manor, one year's rent and an half, ac- "cording to the rent paid to his Majeſty, &c.; and half "as much for every admittance to any eſtate for life, "lives, or years in poſſeſſion or reverſion, or to any "eſtate of inheritance in reverſion, depending upon "ſome particular eſtates;" which the Attorney-General denied; and ſhewed further, that there were parcels of the waſtes of the manor, not demiſed or demiſeable by copy of court roll until of late, ſome part of which had been ſo demiſed, into which the defendants had unlawfully intruded, and had procured grants thereof by copy of court roll without right or title; and made like pretence and claim for the certainty of the fines for grants and admittances of the ſaid waſte as for the aforeſaid ancient *copyhold* tenements; wherein the Attorney-General prayed the advice of the Court, &c. To which information the tenants anſwered; confeſſing that a great part of the lands within the manor were *copyhold* parcel of the manor *demiſed and demiſeable by copy of court roll* of the ſaid manor, *according to the cuſtom of the ſaid manor*, in fee ſimple, fee tail, or otherwiſe. And alleged that ſome of them held in fee ſimple, and others in fee tail, with remainders over, by copy of court roll, according to the cuſtom of the ſaid manor; and inſiſted that the admittance fines for the ſaid copyhold lands were not arbitrary but certain, and had been uſually aſſeſſed as the information charged that they had pretended them to be. And after admitting that divers parcels of the waſte had been granted

granted by copy of court roll, and that divers of the defendants held parcels thereof, ſo improved and granted by copy as aforeſaid, &c. they prayed that the ſaid parcels of waſte might by the Court be declared to be and thereafter to continue lawfully demiſed and demiſeable by copy of court roll, according to the cuſtom of the ſaid manor, upon ſuch rents, &c. as theretofore were, or for ſuch other reaſonable fines as ſhould be thought meet to the Court: and they prayed the Court to decree the fines of the *ancient copyholds* to be certain, according to their petition to his Majeſty as well for the confirmation of the certainty of their fines as of the ſaid grants of the waſte. Whereupon after petition to and compoſition made with his Majeſty for the ſum of £. paid by the ſaid copyholders, it was by the duchy court on the 27th *November*, 7 *Jac.* 1. decreed, that all the tenements, whether theretofore parcel of the ſaid waſte or no, which were then held and compounded for by the defendants, ſhould for ever thereafter remain good and perfect *copyhold* tenements, demiſed and demiſeable in fee ſimple, fee tail, for life, lives, years, or otherwiſe, *by copy of court roll, according to the cuſtom of the ſaid manor*, any defect, &c. to the contrary notwithſtanding. And that all and ſingular the ſaid tenements, and every part thereof, ſhould be demiſed and demiſeable, and ſhould be eſteemed, taken, and adjudged to have been, and for ever thereafter to be demiſed and demiſeable by *copy of court roll, according to the cuſtom of the ſaid manor of* Wakefield, at and for ſuch cuſtoms and ſervices as theretofore, and at ſuch rents as were then paid as well for the parcels of waſte as for other the *copyhold* tenements of the manor holden by the defendants. And further that, in future, fines certain and therein ſpecified ſhould be paid on admittances of

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every *copyholder* to eſtates of inheritance in the ſaid *copyhold tenements*. Which decree was afterwards confirmed, and the tenements therein mentioned were enacted to be good and perfect *copyhold* lands and tenements, according to the true intent and meaning of the ſaid decree, by an act of parliament paſſed in the 7th *Jac.* 1.; and whereby it is alſo enacted that all perſons ſhould hold the ſame to them, their heirs and aſſigns for ever, *by copy of court roll or otherwiſe, according to the cuſtom of the ſaid manor, according to the purport and effect of the ſaid decree*, for ſuch fines, rents, &c., and with ſuch privileges, &c. as in the ſaid decree limited and appointed; ſaving to all perſons (other than the King and his ſucceſſors) all ſuch eſtates, rights and titles as they had in the premiſes, as if that act had not been made. This decree was recorded on the court rolls of the manor of *Wakefield* on the 29th of *July*, 9th *Jac.* 1. The *coal mines* and the *minerals* under the cuſtomary tenements of the ſaid manor, and the *timber* growing thereon, do not belong to the lord but to the cuſtomary tenants of the cuſtomary tenements for the time being; who when ſeiſed of their cuſtomary tenements for any eſtate of inheritance are entitled to get the coals and minerals under the ſame, and the timber thereon. The leſſor of the plaintiff has received one-third of the rents and profits of the cuſtomary premiſes in diſpute for one year ſince *November* 1801, and never took the name of *Wentworth*; and the defendants are in poſſeſſion of the two other third parts of the ſame premiſes. It was agreed, that this caſe ſhould be turned into a ſpecial verdict at the requeſt of either party or of the court. The queſtions for the opinion of the Court were, Whether the leſſor of the plaintiff were entitled to the whole of the ſaid cuſtomary tenements, with the appurtenances

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firſt

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firſt abovementioned *compounded* and *uncompounded*, or to the *compounded only*, and to all of the ſaid moiety of ſuch of the cuſtomary tenements ſecondly above mentioned as were *compounded*, and to the whole of the ſaid cuſtomary tenements, with the appurtenances, which the ſaid *Thomas* Earl of *Strafford* purchaſed as aforeſaid *compounded* and *uncompounded*, or to the *compounded only*, or any and which of them? If the leſſor of the plaintiff were entitled, then the verdict was to ſtand: if he were not, then the verdict was to be entered for the defendant.

Holroyd, for the leſſor of the plaintiff, made two queſtions; 1ſt, as to the effect of the *ſurrender* of *Thomas* Earl of *Strafford*, of the 10th of *April* 1732, to the uſe of his will, whether it extended to ſurrender his *uncompounded*, as well as his *compounded* cuſtomary tenements? 2d, As to the effect of his *will*, whether the cuſtomary tenements included in the ſurrender paſſed by his will to his eldeſt daughter Lady *Anne* and her firſt and other ſons in tail (under which deſcription the leſſor of the plaintiff claims) under the deviſe of all his *freehold* manors, &c. conſidering ſuch cuſtomary tenements as *cuſtomary freeholds*; or if not under that deſcription, whether they did not paſs to her and her firſt and other ſons *by implication* from the whole will taken together? or whether ſuch cuſtomary tenements, being *copyhold*, paſſed by the reſiduary deviſe to the teſtator's three daughters, the Ladies *Anne*, *Lucy*, and *Harriott*, (under the two laſt of whom the defendants claim)? 1ſt, The ſurrender to the uſe of the will of *Thomas* Earl of *Strafford* is of *all the tenements*, &c. holden of the lord of the manor of *Wakefield* by copy of court roll, "being of the *yearly rent* to the lord *in the* "*whole of* 4l. 10s. 8½d. *and compounded for*," which latter

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is a falſe allegation; for the rent of the old *compounded* tenements, which were holden by his father, amounted only to 1*l.* 5*s.*; and the rent of the whole, *compounded* and *uncompounded* together, amounted but to 4*l.* 14*s.* 6*d.*; of which 1*s.* 9*d.* was for the rents of the lands purchaſed by the ſurrenderor himſelf, which were *compounded*. The amount therefore of the rents mentioned in the ſurrender does not agree with any deſcription of property of this kind which he poſſeſſed, but it comes much nearer to the amount of *the whole* of the rents *both compounded and uncompounded* than to the *compounded alone*; and therefore the latter words "*and compounded for*" are clearly inſerted by miſtake: it is a falſe allegation, inapplicable to the ſtate of the ſurrenderor's property, and not intended as a deſcription of the kind of property meant to be ſurrendered. Then the prior deſcription of the tenements meant to be *ſurrendered*, viz. "all and ſingular the meſſuages, &c. which the ſaid earl now holds of the lord of the ſaid manor of *Wakefield* by copy of court-roll, in whoſe tenures or occupations ſoever the ſame now are," is plain and ample enough to include the *uncompounded* as well as the *compounded* tenements: and as the amount of the rents mentioned agrees very nearly with the *whole* as deſcribed in the ſurrender, and the trifling miſtake in the computation would not of itſelf vitiate or narrow the ſurrender as for the whole, ſuppoſing the words "*and compounded for*" were not added; theſe words may be rejected as a falſe allegation concerning that which was before deſcribed generally with ſufficient certainty; and then the ſurrender will include the *uncompounded* as well as *compounded* lands. In *Blague* v. *Gold* (*a*) a deviſe of a houſe called "the Corner Houſe" was holden a ſuf-

(*a*) *Cro. Car.* 447 and 473.

ficient

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ficient deſcription to paſs the houſe ſo named, though it was further ſtated to be in the tenure of *A.* and *B.*, when in fact it was in the tenure of *A.* only; the adjoining houſe being in the tenure of *B.* So a feoffment *by deed* of a man's meſſuage *late of R. C.* in *D.* will operate, though he had in fact lately purchaſed it of *T. C.* *Windham* v. *Windham* (*a*). And again, in the caſe of *The Vicars Choral of Litchfield* v. *Ayres* (*b*), a grant of certain tithes, &c. and all other tithes appertaining to a certain rectory was holden not to be vitiated by a falſe allegation that they were *all lately in the tenure of* M. P., when only part of them were. Secondly, the cuſtomary tenements included in the ſurrender paſſed to Lady *Anne* under the deſcription of all the teſtator's "*ſaid* manors, meſſuages, "lands, &c. in the county of *York*," &c. Suppoſing the word *ſaid* to refer to the deſcription before uſed of "all "his *freehold* manors," &c. That will depend on the nature of theſe cuſtomary eſtates, which were ancient demeſne, and moſt uſually *cuſtomary freeholds*. The mines and timber belong to the tenants and not to the lord; which ſhews that in the earlieſt times they were eſtates of inheritance, and not merely eſtates of a freehold nature only. The holdings are not *at the will of the Lord*, which is the diſtinctive mark of copyhold or baſe tenure, but *according to the cuſtom of the manor*. The language then of the lord or his ſteward calling them *copyholds* cannot make them ſo. Lord *Coke*, (*Copyh. ſ.* 32.) ſpeaking of common copyholders, ſays, "Neither was their eſtate hereditary in the beginning, as appeareth by *Britton*; for if they died, their eſtate was preſently determined, as in caſe of a tenant at will at common law. And in ſome points to this preſent hour, the law regardeth them no more than a mere tenant at will; for the

Conſtruction of the will.

(*a*) *Dy* 376. *b.* (*b*) *W. Jones*, 435.

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freehold at the common law *reſteth not in them*, but in their *lords, unleſs it be in copyholds of frank-tenure, which are moſt uſual in ancient demeſne* (*a*)," &c. "Theſe kinds of copyholders have the *frank-tenure in them*, and it is not in their lords, as in caſe of copyholders in baſe tenure." So in *Co. Lit.* 49. *a.* and 59. *b.* it is ſaid that *by cuſtom* a freehold and inheritance may paſs by *ſurrender*, without livery: and *note* 6. to the former paſſage in Mr. *Hargreave*'s edition gives ſome inſtances, as that of *Lydford Caſtle* in *Devon* (*b*); and adds, that in conſequence of this kind of cuſtom the eſtates ſubject to it have been called *cuſtomary freeholds*. And where an eſtate is granted by copy to hold according to the cuſtom of the manor, omitting the words *ad voluntatem domini*, it ſhall be intended to be a *freehold*. *Hughs* v. *Harrys* (*c*): and thoſe words are the diſtinguiſhing mark of copyhold: *Hill* v. *Bolton* (*d*). And if they are omitted, the land muſt be taken to be *freehold*. *Rogers* v. *Bradley* (*e*). So by *Holt* C. J. (*f*), "Where a cuſtom is that all lands holden of that manor ſhall paſs by ſurrender and admittance, yet the lands may be *freehold*," &c. And in *Gale* v. *Noble* (*g*), it was directly adjudged that theſe cuſtomary eſtates holden *according to the cuſtom of the manor, and not at the will of the lord*, were *not copyholds*, but *cuſtomary freeholds*; though it appeared there that the tenants had conſtantly taken their eſtates to be copyhold. The ſame diſtinction is taken in *Huſſey* v. *Grills* (*h*), and *Crowther* v. *Oldfield* (*i*); which laſt it appears from the report in *Lutwiche* was a caſe ariſing out of this very manor of *Wakefield*; but there the eſtate

(*a*) This paſſage is quoted by the Court in giving judgment in *Burrell* v. *Dodd*, 3 *Boſ. & Pull.* 382.

(*b*) 5 *Co.* 84. *b.* (*c*) *Cro. Car.* 229. (*d*) 2 *Lutw.* 1271.
(*e*) 2 *Ventr.* 143. (*f*) *Anonym.* 11 *Mod.* 53. (*g*) *Carth.* 32.
(*h*) *Ambl.* 301. (*i*) *Salk.* 364. 2 *Ld. Ray.* 1225. and 1 *Lutw.* 125.

which

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which was declared to be holden by copy of court roll, according to the cuſtom of the manor, was intended after verdict to be alſo holden *at the will of the lord* to entitle the party to his common claimed by the cuſtomary tenants within the manor. Then there is nothing inconſiſtent with theſe being cuſtomary freeholds in the information and decree in the time of *James* 1ſt, or the ſtatute founded thereon. The objects of the information were two; 1ſt, to get rid of the certainty of the fines; 2d, to ſet aſide certain intruſions on the waſte. The information alleges that the tenements were copyholds *at the will of the lord*, according to the cuſtom of the manor. But though the anſwer by the tenants confeſſes the lands to be *copyhold*, "*according to the cuſtom of the manor*," yet from what is ſtated it appears that they were *cuſtomary freehold*; and the prayer of the defendants is, that the lands might be declared to be "demiſed and demiſeable by copy of court roll, according to the cuſtom of the manor, upon ſuch rents and for ſuch fines, &c. as [illegible] mentioned to be paid, &c.;" and the decree, which confirms them to be *copyholds*, declares them at the ſame time to remain "demiſed and demiſeable *in fee ſimple*, &c. or "otherwiſe by copy of court roll, *according to the cuſtom* "*of the manor*, at the old rents;" omitting "*at the will of the lord*:" which ſhews that they were not copyholds in the legal ſenſe, but cuſtomary freeholds. The decree then did not alter the old tenure, but left it as it was before. The object of the ſtatute was merely to carry the decree into effect: and it contains, beſides, a ſaving of the rights of all perſons, other than the King and his ſucceſſors. The terms of admittance ſtating the lands to *be holden of the lord by copy of court roll*, generally, cannot vary the nature of the eſtate; for thoſe are merely the words of the

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lord and his ſteward; nor can the reputation of their being *copyholds*, and being ſo called, alter the legal tenure. The queſtion then is, whether, if the tenements be cuſtomary freeholds, they paſſed to Lady *Anne* and her deſcendants under the words of the will. A deviſe or leaſe of all a perſon's *lands* will paſs *cuſtomary* copyhold as well as freehold lands; as in *Acherley* v. *Vernon* (*a*). But in *Haſlewood* v. *Pope* (*b*), where there was a deviſe of all a man's lands in truſt to pay debts, &c. and the deviſor had freehold and copyhold; held the former only would paſs, unleſs he had ſurrendered his *copyhold* to the uſe of his will, which ſhewed an intention to paſs both. And *Tendril* v. *Smith* (*c*) is alſo expreſs to that purpoſe. In the ſame manner where there is a general deviſe of *freehold* lands, all *freeholds* will paſs, whether *cuſtomary* or at *common* law. Beſides which, in this caſe the introductory words ſhew that the deviſor meant to paſs the whole of his property; for he ſays, "as to the worldly eſtate," &c.; which Lord *Kenyon*, in *Doe* v. *Buckner* (*d*), ſaid was ſufficient to ſhew an intent to diſpoſe of all the deviſor's property, if there were ſubſequent words in the will to carry that intent into execution; as in *Ibbetſon* v. *Beckwith* (*e*): and the word *eſtate* is of itſelf ſufficient to paſs an eſtate of inheritance, without words of limitation (*f*): and ſuch introductory words were alſo relied on in *Smith* v. *Coffin* (*g*), and *Gulliver* v. *Poyntz* (*h*). The words, "*all my freehold manors*, "*meſſuages, lands*," &c. are not to be narrowed, but to have their full effect from the introductory words. Here

(*a*) 9 *Mod.* 68. 10 *Mod.* 518. 529. and *Comyn. Rep.* 381.
(*b*) 3 *P. Wms.* 322.
(*c*) 2 *Atk.* 85. Vide alſo *Goodwyn* v. *Goodwyn*, 1 *Veſ.* 226.
(*d*) 6 *Term Rep.* 612.
(*e*) *Caſ. temp. Talb.* 157.
(*f*) *Doe* v. *Allen*, 8 *Term Rep.* 502.
(*g*) 2 *H. Blac.* 444.
(*h*) 3 *Wilſ.* 143.

too

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too the will was made within two or three months after the date of the ſurrender; which alſo affords a preſumption that the deviſor contemplated to paſs by his will the lands included in the ſurrender. Further, the deviſor firſt deviſes the annuity to his wife and mother "*out of all his real* "*eſtate whatſoever*:" and then he deviſes "all his *freehold* "manors, &c. in the counties of *York*, *Nottingham*, &c. "*ſubject as to the ſaid premiſes* (which muſt mean *all the* "*lands* cuſtomary or otherwiſe) in the ſaid counties of "*York*," &c. *to the annuities* before deviſed to his wife and mother, to his ſon, &c. Then in caſe of failure of iſſue male of his ſon, he deviſes "all his ſaid manors, lands, "&c. in the counties of *York*," &c. to his brother, &c. Then in default of the male line, in the clauſe in queſtion he deviſes *Wentworth* caſtle, and *all his ſaid manors, meſſuages, lands, tenements, &c. in the ſaid county of* York unto his daughter Lady *Anne*, &c. This ſhews that he meant to paſs *all his eſtate* that he had before ſubjected to the rent-charges to his wife and mother. And again, in caſe the deviſor's other freehold premiſes and poſt fines were not ſufficient to pay the annuities while his brother *Peter* and his heirs male were in poſſeſſion of the eſtates in *Yorkſhire*, the deficiency is to be made good out of his *ſaid eſtates* in the counties of *York*, &c. before deviſed to his brother: which ſhews that he conſidered he had before deviſed the whole of his eſtate in *Yorkſhire* to his brother by the ſame deſcription as he afterwards deviſed it to Lady *Anne*. Then nothing can be argued againſt the general intention to paſs the *cuſtomary* eſtates under the general term of *freehold* lands, &c. from the particular mention of *copyholds* in parts of the will; for as he had before deviſed the copyholds in *Twickenham* to his wife and mother reſpectively, he neceſſarily mentions thoſe copyholds

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by name in the leading limitation to his ſon (which precedes the deviſe in queſtion); becauſe his ſon and the ſubſequent deviſees in remainder would only take the *reverſionary intereſt* in them after the life eſtates of the wife and mother were ſpent: and that accounts for the deviſe of "all his ſaid *freehold* premiſes, and alſo his *two copyhold* meſſuages in *Twickenham after the reſpective deceaſes of his mother and wife* to his ſon, &c. It appears therefore that he uſed the term *freehold* ("all his *freehold* manors, lands," &c.) in its moſt general ſenſe, as including *cuſtomary* as well as *common law freeholds*; which cuſtomary freeholds were diſtinguiſhed in *Crowther* v. *Oldfield* (*a*) from *copyholds* properly ſo called. And in *Greenhill* v. *Greenhill* (*b*), where one had articled for the purchaſe of lands, *part* of which were *cuſtomary* lands, which were paid for, and the conveyances were to be executed at *Michaelmas*, and in *June* preceding he deviſed the reſidue of his perſonal eſtate to be laid out in land, and the land ſo to be purchaſed, together with his *freehold* eſtate, to be ſettled on the plaintiff, &c.: held that the land thus contracted for, including the *cuſtomary* lands, paſſed by the will. It was ſaid indeed there that *freehold* was only named in contradiſtinction to *perſonal* eſtate. But here it is not mentioned in contradiſtinction to *cuſtomary* lands, though it may to *copyhold* holden *at the will of the lord*, of which the deviſor was alſo poſſeſſed. [*Lawrence* J. He had no copyhold of that deſcription in the counties of *York*, *Nottingham*, or *Lincoln*; and therefore he could not have mentioned *freehold* in that part of his will in contradiſtinction to copyhold holden at the will of the lord.] Then as to the reſiduary clauſe, if theſe cuſtomary lands are not before deviſed, they cannot paſs but by implication, until

(*a*) *Salk.* 364. (*b*) 2 *Vez.* 679.

failure

failure of iſſue male of himſelf and his ſon: but it is a ſettled rule that if there be words in a will ſufficient to paſs an eſtate, it ſhall not be left to paſs by implication. As to the powers of leaſing and jointuring, they are as neceſſary in the caſe of cuſtomary as of common law freeholds.

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Walton, contrà, (after premiſing that in conſequence of Mr. *Conolly*'s death recently, he ſhould wave the queſtion as to the forfeiture by his not having taken the name of *Wentworth*,) made two queſtions; 1ſt, on the effect of the ſurrender, Whether it comprized the *uncompounded* lands? 2dly, on the general conſtruction of the will, in reſpect of the deviſe of all the deviſor's *freehold* manors, &c. and on the reſiduary deviſe to the three daughters. 1ſt, At the time of the ſurrender Lord *Strafford* was ſeiſed of three deſcriptions of copyholds; 1. copyholds *compounded* and *uncompounded* (in other words, with fines certain and fines arbitrary), of which he was ſeiſed in tail male as heir of his father; 2. of moiety copyholds *compounded* and *uncompounded*; over the compounded he had a diſpoſing power; of the uncompounded there was a general entail ſtill ſubſiſting, of theſe, therefore, he was ſeiſed in tail general; 3. of copyholds, ſome *compounded*, ſome *uncompounded*, which had been purchaſed by himſelf; of which the lord's rent was not above 1*s*. 8½*d*. He had, therefore, very little diſpoſing power over the copyholds, without incurring the expence (two years' value) of barring the entail, and that too by means of making a leaſe for ſix years (*a*), which creates a forfeiture. The

Conſtruction of the ſurrender.

(*a*) Where there is no particular cuſtom within a manor for barring an entail, it is ſaid that the ſurrender itſelf to the uſe of the will may bar it, *White* v. *Thornburgh*, 2 *Vern.* 705, and *Moore* v. *Moore*, *Ambl.* 279.

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uncompounded lands conſtituted much the greater part, of which he had not the immediate diſpoſing power, but only a diſtant reverſion: there is therefore nothing improbable in ſuppoſing that he meant to paſs by the ſurrender thoſe only which it expreſſes, namely, the *compounded* lands. Surrenders are to be conſtrued as ſtrictly as deeds, and that is a bad conſtruction which leaves out an integral part of a ſentence, the plain and obvious ſenſe of which is to control the former words of it. It is a general rule in conſtructing any deed or inſtrument that where there is ſufficient certainty before by way of deſcription of the thing granted, as by giving to a cloſe a particular name, &c.; there a ſubſequent miſtake, as in the tenant's name, the number of acres, or the rent, ſhall not hurt the grant. But where the premiſes are firſt deſcribed *generally*, and afterwards a *particular* deſcription is added, that ſhall reſtrain the general words. *Bro. Abr. Grants, pl.* 92. *Fitzh. Abr. Releaſe, pl.* 11. In *Doddington's* caſe (*a*) it is ſaid where one grants omnia *illa* meſſuagia in tenura *J. B.*, ſcituat. in *W.*, &c., and in truth the lands lie in *D.*, the grantee ſhall not have any lands out of the town to which the generality of the grant doth refer: "for *illa* makes ſuch a neceſſary reference, as well to the town as to the tenure of *J. B.*, that if one or the other fail the general grant is void: for *illa* is not ſatisfied till the ſentence be ended, and it governs all the ſentence till the full ſtop." So where one deviſed to his ſon *H.* all his lands, &c. freehold and *copyhold* in *C.* or elſewhere in the county of *M.* ("which copy lands I have ſurrendered to the uſe of my will) to him and his heirs;" Lord Chancellor held that the words in a parentheſis could not be rejected as ſuperfluous; that they were to be taken as reſtrictive of

(*a*) 2 *Rep.* 33.

the

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the former words; and therefore that a part of the copyhold houſe in *C.* which he had purchaſed after the ſurrender to the uſe of his will did not paſs. And this ruled a ſimilar caſe of *Wilſon* v. *Mount* (*a*), where the Maſter of the Rolls ſtates the reſult of the caſes referred to to be, that if a *viz.* be repugnant to what has gone before, it ſhall be rejected; but *if it can be reconciled and made reſtrictive, it ſhall be ſo.* As to the principal caſe cited contrà of *Swift* v. *Eyres*, it is alſo reported in *Cro. Car.* 548., and there the reaſon aſſigned why the laſt clauſe was not reſtrictive is, becauſe what went before was not in one entire ſentence, but diſtinct and disjoined from the other: and then the word *all* ("all which were," &c.) ſo diſjoined could not be a reſtriction but an explanation.

Conſtruction of the will.

Next, As to the conſtruction of the will; it is contended that the cuſtomary eſtates ſurrendered are *cuſtomary freehold*, and that they paſſed under the deviſe of "all "his *freehold* manors, lands," &c. For all his *ſaid* manors, &c. in the deviſe to Lady *Anne* muſt have reference to the manors, &c. before deſcribed, which are deſignated as *freehold manors*, &c. But it is clear that they are in general conſidered not as *freeholds*, but as *copyholds.* They are a ſpecies of villenage tenure, holden by *copy of court roll*; the name of *copyhold* being comparatively modern (*b*); tranſmiſable by ſurrender and admittance; forfeitable if leaſed for above a year, or in default of ſuit and ſervice. All theſe circumſtances ſhew them to be of baſe tenure, or at beſt no more than a ſuperior kind of copyholds. The tenants were more privileged when holding of the king in ancient demeſne, than when holding of inferior barons. 2 *Blac. Com.* 99, 100. gives ſhortly the reſult of the treatiſe on copyholds, and ſhews what the learned au-

(*a*) 3 *Veſ. jun.* 191. (*b*) Vide *Fitz. Na. Brev. Writ de Recto Clauſ.*, 25.

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thor conſidered theſe cuſtomary tenants to be, namely, only highly privileged villeins, whoſe *tenure* was abſolutely *copyhold*, though they had an *intereſt* equivalent to a *freehold*. But if the tenants were freeholders they muſt have a right to vote for knights of the ſhire: but in the election of 1755 for the county of *Oxford*, where a cuſtomary tenant in ancient demeſne had voted for Lord *Wenman*, the Houſe of Commons ſet aſide his vote. In the year following a bill was brought into the Houſe to ſettle the queſtion, which did not paſs. In 1758 *Blackſtone*'s tract, intitled "Conſiderations on Copyholders," was firſt publiſhed, and ſoon after the ſtatute 31 *Geo.* 2. *c.* 14. was paſſed, which is tantamount to a declaratory law, reprobating the pretended right of ſuch cuſtomary tenants to vote as freeholders, and denying the exerciſe of it in future under a penalty. If this were a freehold tenure it muſt have been aboliſhed and reduced to free and common ſocage by the ſtat. 12 *Car.* 2. *c.* 24. not being within either of the excepted caſes. Land claimed as ancient demeſne is always pleaded to be *parcel of the manor*; and ſo it was pleaded to be in *Crowther* v. *Oldfield* (*a*) in this very manor: and there the judgment having been arreſted in *C. B.* for want of laying the copyhold in reſpect of which the common was claimed to be holden *ad voluntatem domini*, that judgment was reverſed in *B. R.*; the defect being cured by verdict; for, as was ſaid, freehold could not be *parcel of the manor*, as this was laid to be, though it migh be holden *of the manor*: and that was relied on in *Burrel* v. *Dodd* (*b*). Some Judges indeed, in the caſes referred to, have conſidered theſe cuſtomary eſtates as *freeholds*, generally: but that is a miſtake. Tenants in ancient demeſne are of three ſorts; 1. *Charter tenants*,

(*a*) 1 *Lutw.* 125. *Salk.* 364. 2 *Ld. Ray.* 1225.
(*b*) 3 *Bos. & Pul.* 381.

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who are seised as of freehold: 2. *Tenants by copy* of court-roll, or *customary tenants*: 3. *Bond tenants*. To the former description only can the term *freehold* be in any sense applied. *Fitz. Na. Br. Writ de Recto Clauso*, 23. and the notes. And in *Doe* d. *Reay* v. *Huntington* (*a*) these customary tenants were lately considered as a class of copyholders. [Lord *Ellenborough* C. J. Some of those tenants, though obliged to perform military service in attending on the border of *Scotland* for an uncertain time, and therefore so far favouring of military tenure by escuage uncertain, were yet, upon a question referred to the Judges, and amongst others to *Hutton* J. in the time of *James* I., considered to be copyholders.] Besides, these estates are found to have been always called and reputed *copyholds* by the tenants: and, as such, it is reasonable to presume that the testator considered them in common with the other tenants; and that he used the word *freehold* in its common and popular acceptation. And they are named copyhold in the admittance of the lessor of the plaintiff himself, and in the mandamus which he sued to admit him. They are also so called in the proceedings in the time of *James* I. And the tenants there admit that they are *copyhold*, though not that they are holden *at the will of the lord*, as suggested in the information filed by the Attorney-General: and such they are stated to be by the decree, confirmed by the act of parliament; the *saving* in which relates only to strangers to the decree, and not to those who were privies to it, as the tenants were, and therefore bound by it. And the decree includes all the tenements and not merely those taken out of the waste. Then as to the general construction of the will, introductory words can only serve to explain the *intention* to pass *all*

(*a*) 4 *East*, 288.

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the deviſor's property, where there are ſubſequent words large enough to carry the whole property: but here the words of deviſe limit the deſcription to *freehold* property. No intention can be gathered from thence to paſs the *cuſtomary* eſtates, which are of the nature of *copyhold*. If he had meant to paſs them he would have probably ſaid ſo in terms, eſpecially as he mentioned certain *copyholds* at *Twickenham* by name; or at leaſt he would not have excluded ſuch an intention by the addition of the term *freehold* to the other general terms of deſcription. But further, the old cuſtomary eſtates would have deſcended to Lady *Anne* as tenant in tail under the old entail, and therefore it was nugatory to give her an eſtate for life. Again, the *leaſing* power is inapplicable to *cuſtomary* eſtates, which could not be leaſed for above a year without creating a forfeiture; and there would be great difficulty in applying to them the charging and jointuring power: it could only be done by ſurrendering them to truſtees. Then the reſiduary clauſe is comprehenſive enough to convey all the property not before diſpoſed of. He thereby gives to his three daughters, in default of iſſue male of himſelf and his ſon, "all other his manors, meſſuages, lands, &c. whatſoever and whereſoever, either freehold or *copyhold*, (except thoſe in the ſaid counties of *York*, *Lincoln*, *and Nottingham*, *which I have already ſo diſpoſed of*," &c.) There he uſes the word *freehold* as contradiſtinguiſhed from *copyhold*, and uſes both where he meant both. And the exception refers to the *eſtates* which he had before given in thoſe counties, and does not neceſſarily imply that he had before given all his freehold and *copyhold lands*, &c. in thoſe counties, for in ſome of them he had no copyholds: and in the greater part of the copyholds he had only a remote reverſion to diſpoſe of. No new eſtate was

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meant to be paſſed by the exception. It is true that according to *Walter* v. *Drew* (*a*) an *eldeſt ſon* may take an eſtate tail by implication, upon a deviſe over in caſe he happen to die without *iſſue*; but that was in favour of the heir; and here all the daughters conſtituted but one heir at law of Lord *S.*, failing iſſue of his ſon; and therefore the Court would not diſinherit them but by expreſs words or neceſſary implication. But if the ſon took theſe copyholds in tail they would go over, in default of his iſſue, to all the daughters alike: or if they took by way of executory deviſe, it would avail the defendants equally.

Holroyd, in reply, obſerved as to the ſtate of the property, that whether Lord *Strafford* had a fee (as he ſuppoſed him to have in part) or only an eſtate tail, his having ſurrendered to the uſe of his will ſhewed an intention to diſpoſe of what he had. Theſe cuſtomary eſtates were diſtinguiſhed, as copyholds of *frank tenure*, from copyholds holden *at the will of the lord*, in the caſe of *Burrell* v. *Dodd* (*b*); and it was ſaid that in the former the *freehold* veſted in the tenant and not in the lord. In ſome manors the form of the admittance to tenant right eſtates is different, as in *The Duke of Somerſet* v. *France and Others* (*c*), where it was to hold ad voluntatem domini ſecundum conſuetudinem manerii; and there, upon the death of the admitting lord, the eſtate was altogether out of the tenant, though he had a right to be readmitted, paying his fine. In ſuch manors, therefore, where the eſtate paſſes by the mere admittance of the lord, without the grant of the tenant, the freehold may remain in the lord: but not where it paſſes by the grant of the tenant, and the ad-

(*a*) *Comyns' Rep* 372. (*b*) 3 *B. & P.* 378.
(*c*) *Fortſc.* 41. and 1 *Stra.* 654.

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miſſion is a mere recognition on the part of the lord. The tenant may have the *freehold* though the inheritance be in the lord. And this is ſhewn by the form of pleading, where the tenant is ſaid to be *ſeiſed* of the eſtate, which muſt be an eſtate of freehold; but it is alſo ſaid to be *parcel of the manor*, inſomuch as the inheritance is in the lord; though by the cuſtom the heir has a right to claim admittance: and they are pleadable as eſtates deſcendible from anceſtor to heir. Such cuſtomary eſtates, Lord *Hardwicke* ſays, in *Huſſey* v. *Grills* (*a*), never were of baſe tenure; and Lord *Coke*, in his *Copyholder*, ſtates them to be of frank tenure. And though Mr. Juſtice *Blackſtone* conſiders them otherwiſe in his treatiſe, in order to ſhew that ſuch tenants were not entitled to vote for knights of the ſhire; yet that is not ſupported by the caſes cited, and was not neceſſary for the purpoſe of his argument; for none were entitled to vote at a county election but the freeholders who were bound to attend the county court: and theſe tenants in ancient demeſne being privileged from ſuch attendance would not have a right of voting, though their tenure was clearly freehold.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court. After ſtating the caſe—

Upon the argument of this caſe two principal points were contended for on behalf of the plaintiff; the firſt was, that in the ſurrender by *Thomas* Earl of *Strafford*, on the 10th of *April* 1732, to the uſe of his will all his cuſtomary eſtates, as well thoſe which were *uncompounded* as thoſe which were *compounded*, were comprehended. The ſecond point was, that by the deviſe of

(*a*) *Ambl.* 301.

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"all his *freehold* manors, meſſuages, lands, tenements, and hereditaments in the counties of *York*, *Nottingham*, *Lincoln*, *Northampton*, *Suffolk*, *Kent*, and *Middleſex*, or elſewhere in *Great Britain*," the *cuſtomary* lands, the ſubject of this ejectment, paſſed.

As to the firſt queſtion which has been made upon the effect of the ſurrender; the caſes cited from *Cro. Car.* 447., *Dyer*, 376., and Sir *Wm. Jones*, 435., were relied on by the plaintiff's counſel, for the purpoſe of ſhewing that the ſurrender extended to the *uncompounded* as well as the *compounded* copyholds. But theſe caſes appear very diſtinguiſhable from the preſent. The firſt of them, which is the caſe of *Blague* v. *Gould*, was a deviſe of a corner houſe in *Andover*, deſcribed as being in the tenure of *Benſon* and *Hitchcock*, whereas it was in fact in the tenure of one *Benſon* and one *Nott*; the deviſor alſo having another houſe, thereto near adjoining, in the tenure of *Hitchcock*. And it was holden that the corner houſe, in the tenure of *Benſon* and *Nott*, paſſed; for that was the deviſe of a thing ſufficiently aſcertained by the words "*corner houſe*:" and there the intent was apparent that the corner houſe ſhould paſs in whoſever tenure it might happen to be. And the ſame caſe is further reported as again argued, and finally adjudged, *Cro. Car.* 473., where it is ſaid that the addition in tenurâ of *Hitchcock*, although it be not in his tenure, and be a miſtake, yet it is but ſurpluſage; and, although falſe, ſhall not vitiate the deviſe; becauſe the deviſe was of a thing certain at firſt, and ſhall be expounded according as the intent of the parties is apparent. The caſe of *Wyndham* v. *Wyndham*, *Dyer*, 376. was the caſe of a feoffment of a houſe, lately of RICHARD *Cotton* in *D.*; which was falſe, the owner being THOMAS *Cotton*. The feoffor had no other houſe in *D.*, and the

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feoffment was holden good. And the reaſon, according to Ld. *Hardwicke*, (3 *Atk.* 9.) was, that otherwiſe the deviſe would have been void. But in the caſe now before the Court, the ſurrender will not be void, though it ſhould be conſtrued not to extend to the uncompounded lands. And there is another circumſtance by which the preſent caſe is diſtinguiſhable from thoſe, viz. that in them the grant was of one particular thing ſufficiently aſcertained by ſome circumſtance belonging to it; in which caſe, according to the doctrine upon this head, which is fully diſcuſſed in Lord *Hobart*, 171, 2. a circumſtance *miſtaken and falſe* will not fruſtrate *the grant of particulars ſufficiently once aſcertained.* But here the words firſt uſed are *general* words, not deſcriptive of *particular* things: and, according to Lord *Hardwicke* in *Gaſcoigne* v. *Barker*, 3 *Atk.* 9. "where a man does not make a certain definitive de-"ſcription, it is very difficult for courts of juſtice not "to conſtrue ſubſequent reſtrictive words as explana-"tory of the former." And this diſtinction is to be found in *Dyer*, 50. *b.*, where *Harwood* the Attorney-General laid it down, that "if I releaſe all the right which I have in *White Acre*, and name all the land in certain which I bought of ſuch a man, and in truth I bought it of another; yet, becauſe the land is certainly named at "firſt, the releaſe is good, notwithſtanding the miſrecital "afterwards; but where it is made general, it is other-"wiſe." As, for inſtance, if it had been "all my land which I bought of ſuch a man," having bought none of him; in that caſe there would have been no baſis of certainty laid to have given effect by reference to the other words; and they muſt, on that account, have been merely inoperative and void. The ſame doctrine is to be found in the Year-book, *M.* 2 *E.* 4. *p.* 39. and in *Fitz. Ab.* tit.

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tit. *Releaſe*, 11. The caſe of the Vicars Choral of *Litchfield* v. *Eyres*, in Sir *W. Jones*, 435. was a grant of all the tithes belonging or appertaining to them as appropriators of a certain pariſh, "all which were lately in the occupation of one *Margaret Peto*, widow, deceaſed." And there it was holden that all tithes belonging to the rectory paſſed, though none, or only a part, had been in the poſſeſſion of *Margaret Peto*. This caſe, according to the report of it in *Cro. Car.* 546. and 2 *Roll. Abr.* 52. *pl.* 26., was decided on the ground, as ſtated in *Rolle*, "*that theſe words were words of ſuggeſtion or affirmation, and not of reſtriction or limitation, becauſe the ſentence was perfect before*," and the words *all which*, &c. commence a new ſentence, and are not a part of the firſt or general ſentence; and, as ſaid in the report in *Croke*, the word *all* ſo disjoined cannot be a reſtriction, but an explanation. But here there can be no queſtion whatever but that the words "*being of the yearly rent of* 4*l.* 10*s.* 8½*d. and compounded for*" are part of the general ſentence: and where there is no disjoining or diviſion in the words or ſenſe, but the whole is one entire ſentence, the one part may well reſtrain the other. And the caſes, cited by Mr. *Walton* for the defendants, of *Gaſcone* v. *Barker*, 3 *Atk.* 9., and *Wilſon* v. *Mount*, 3 *Veſ. jun.* 191., fully ſhew that what is mere allegation may, if conſiſtent, operate as a reſtriction. We are therefore, upon theſe authorities and conſiderations, of opinion that the words "*and compounded*" operate by way of reſtriction in the preſent caſe, and confine the ſurrender, in point of effect, to that deſcription of copyholds then belonging to the ſurrenderor; and that the words "*yearly value of* 4*l.* 10*s.* 8½*d.*," being referable to no actual amount of rents in this caſe, cannot qualify or impugn this reſtriction.

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As to the ſecond queſtion; it appears by the caſe that Lord *Strafford*, at the time of making his will, was ſeiſed of conſiderable *freehold* eſtates in the counties of *York*, *Nottingham*, *Lincoln*, *Middleſex*, and elſwhere in *Great Britain*, and that he was alſo ſeiſed of certain *cuſtomary tenements* in the manor of *Wakefield*, in the county of *York*; of ſome part of them in tail male, of other part in tail general, and in fee of the reverſions, and of other cuſtomary lands in fee; and beſides theſe, that he was ſeiſed of ſome *copyholds* in *Middleſex*, which were ſuch in the ſtricteſt ſenſe of the word. Theſe cuſtomary lands in *Yorkſhire* are by the ſurrender, which it is inſiſted comprehended them, deſcribed as being *holden* of the lord *of the manor of* Wakefield *by copy of court-roll*; and the leſſor of the plaintiff himſelf has obtained a mandamus from this Court to admit him to the lands for which this ejectment is brought, deſcribing them as COPYHOLD *lands within the manor of* Wakefield, whereof *Thomas* Earl of *Strafford* died ſeiſed. It is alſo ſtated by the caſe that the manor of *Wakefield* is ancient demeſne, and that the cuſtomary tenements of the manor are *demiſed and demiſeable by copy of court-roll of the ſaid manor*; that they have always been called and reputed *copyholds*; but that none of the admittances ſtate the tenants to hold *at the will of the lord*. It appears alſo by the caſe, that in the reign of *James* I. certain proceedings were had in the duchy court of *Lancaſter*, in which the matters in diſpute were, whether the fines payable to the lord were fines arbitrary or not, and whether the grants which ſome of the tenants had obtained of the waſte were valid: and that in all thoſe proceedings the eſtates of the tenants were conſidered as *copyhold* tenements demiſed and demiſeable by copy of court-roll according to the cuſtom of the manor. In addition

dition to this it does not appear that Lord *Strafford* had any other lands in *Yorkſhire* holden by copy of court roll. Lord *Strafford* being thus circumſtanced with reſpect to his property, the queſtion before us is, What did he mean to paſs by that part of his will in which he ſpeaks of his *freehold* lands, tenements, and hereditaments? In the courſe of the argument it could not be contended, if Lord *Strafford* had been ſeiſed of what the counſel for the leſſor of the plaintiff allow to be *copyhold* lands which had lain in *Yorkſhire*, that the deviſe would have comprehended them under the denomination of *freehold*. And in order to get rid of the effect of that word *freehold*, which applies to his lands in *Yorkſhire*, as well as to thoſe in the other enumerated counties, it has been inſiſted that the premiſes in queſtion are property of that deſcription of freeholds which are called *cuſtomary freeholds*. And many caſes and authorities have been cited to ſhew that cuſtomary tenants, who do not hold at the will of the lord, are not *copyholders*, but *freeholders*. But without going into the learning reſpecting tenants in ancient demeſne, and other tenants who hold by copy of court-roll according to the cuſtom of the manor, though not at the will of the lord, (the whole of which is collected by Mr. Juſtice *Blackſtone* in his Conſiderations on Copyholders,) we think, upon this occaſion, as the cuſtomary lands in queſtion are demiſeable by copy of court-roll, have always been called and reputed *copyhold*, and that ſuch of them as the teſtator himſelf ſurrendered to the uſe of his will were deſcribed by him expreſsly as holden by copy of court-roll, that he cannot be underſtood as having intended to paſs them under the deſcription of *freehold* lands. In diſpoſing of their property teſtators uſually advert to the known and ordinary circumſtances attend-

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ing it, and adopt the appellations by which it is generally and more familiarly diſtinguiſhed; and cannot be ſuppoſed to regard or conſider thoſe equivocal or leſs obvious qualities of their eſtates, about the effect of which profound lawyers and legal antiquaries might entertain controverſies (*a*). The diſtinction between eſtates which may be immediately transferred from man to man by deeds and inſtruments executed merely between the parties themſelves, and thoſe eſtates, the titles to which are evidenced by copies of the rolls of the courts baron of different manors, is familiar even to men the leaſt acquainted with the rules of property: but the diſtinction, and ſtill more the effect of the diſtinction between tenants by copy of court-roll *at the will of the lord* according *to the cuſtom of the manor*, and tenants *by copy of court roll* ſimply *according to ſuch cuſtom*, as determining the one to have a freehold intereſt, and the other not, is a diſtinction not at all likely to occur to perſons in general when diſpoſing of their property; or to be adopted by them if it did occur. If Lord *Strafford*, having made due ſurrenders to the uſe of his will, had deviſed *all his copyhold eſtates in* Yorkſhire, there could be no queſtion made but that thoſe eſtates which are now contended to be *freehold* would have effectually paſſed under the above deſcription, *i. e.* as *copyhold*. If the language of this will is attended to, it will be found that where the teſtator meant to paſs or charge his eſtates without any regard to their quality or tenure, he has uſed words which, in their generality, would comprehend *all*, without adding others which might, by conſtruction, operate to narrow or reſtrain their meaning. In the introduction to his will he ſpeaks of his *worldly eſtate*; a moſt comprehenſive term, extending to

(*a*) Vide *White's Rep.* 354.

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property of every deſcription. To his wife he deviſes an annuity out of all his *real eſtate*, in lieu of her dower or thirds at common law, which ſhe might otherwiſe claim out of any part of his real eſtate which he had been or ſhould or might be ſeiſed of during their intermarriage; words of meaſured extent and caution peculiarly fitted for the purpoſe he had in view. To his mother he gives an annuity out of all his *real* and perſonal eſtate, in lieu of her jointure, dower, or thirds at common law, and all other demands out of the *real* and perſonal eſtate of her late huſband. After which comes the deviſe upon which the queſtion ariſes, in which the teſtator no longer uſes expreſſions of a generality calculated to carry *all* his lands in the enumerated counties, but only thoſe which are *freehold*; accompanied by a deviſe by name of *two copyhold meſſuages in* Twickenham; marking thereby a knowledge, on his part, that in order to paſs thoſe copyholds at leaſt the words he had uſed before were inſufficient. The remaining part of the will furniſhes no argument of intent to be drawn from the uſe of any particular expreſſions until we come to the reſiduary clauſe, which the counſel for the leſſor of the plaintiff contends to have furniſhed an argument in his favour, from the circumſtance of theſe cuſtomary lands being undeviſed until after failure of the iſſue of his ſon Lord *Wentworth*, and of his, Lord *Strafford*'s, own body, unleſs they are comprehended under the deſcription of *freehold* lands; which it is ſaid he never could have intended from the introduction to his will, where he profeſſes an intent to diſpoſe of all his worldly eſtate. But in anſwer to this it has been juſtly ſaid that there will be no inteſtacy if the heir at law, according to the caſe of *Walter* v. *Drew*, in *Comyns's Reports*, took an eſtate tail by implication. And it would be carrying

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rying the effect of introductory words much further than has been hitherto done, if they ſhould be ſo conſtrued; for though they have been holden to aſcertain the extent of an eſtate in lands unqueſtionably deviſed, we are not aware of any caſe which has decided that ſuch introductory words will alter the obvious and natural conſtruction to be put on words uſed by a teſtator, which of themſelves admit of no doubt, unleſs indeed the context ſhould neceſſarily and abſolutely require ſuch ſenſe to be put upon them; which is not the caſe in the preſent inſtance. But this reſiduary clauſe furniſhes, from the penning of it, an additional argument, that the teſtator's intent was confined to what were, according to common underſtanding, *freehold* lands: for after, in certain events ſpecified in that clauſe, deviſing all his ſaid manors, lands, and hereditaments in the counties of *Lincoln* and *Nottingham* to his three daughters *Anne*, *Lucy*, and *Harriott*, he deviſes all other his manors, meſſuages, lands, tenements, and hereditaments whatſoever, either *freehold or copyhold*, (except thoſe in the counties of *York*, *Lincoln*, and *Nottingham*, which he had before deviſed) to his three daughters; again marking the diſtinction between *freehold* and *copyhold* eſtates, and ſhewing that where he meant to paſs *copyhold*, he felt it neceſſary ſo to deſcribe it. Upon the whole, therefore, we are of opinion that no ſufficient argument ariſes, either from the introductory words, or from any other part of the will, which will warrant us in annexing to the word *freehold*, as it occurs in the deviſe in queſtion, any other meaning than that which, in the ordinary underſtanding of a common teſtator, it would naturally and obviouſly bear; and ſtill leſs ſo in the caſe of a teſtator conuſant, as this teſtator appears to have been, of the proper nature, quality, and denomination of

the

the different ſpecies of property he profeſſes to diſpoſe of by his will. For theſe reaſons we are of opinion that the defendants are entitled to judgment.

Poſtea to the Defendants.

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DOE, on the ſeveral Demiſes of STEVENS and PAIN, *againſt* SNELLING and Others.

Friday, April 27th.

IN ejectment to recover certain premiſes in *Bramley* and *Wonerſh* in the county of *Surry*, tried before Lord *Ellenborough* C. J. at the laſt aſſizes for that county, a verdict was taken for the plaintiff, ſubject to the opinion of the Court on this caſe.

Sarah Dabner, late of *Wonerſh* in the county of *Surry*, widow, deceaſed, being ſeiſed in fee (amongſt other things) of the premiſes in queſtion, by her will, dated the 27th of *July* 1785, duly executed and atteſted, deviſed as follows: "Concerning my worldly eſtate, I give "and diſpoſe thereof as follows, (viz.) I give and be- "queath unto *Michael March* of, &c. 1*s.*: alſo I give "and bequeath unto his wife *Ann March*, 2*s.*: alſo I "give and bequeath unto *Elizabeth Stevens* of, &c. 50*l.* "(with other bequeſts in the ſame form of words.) All "which ſaid ſums to be reſpectively paid in 12 months "after my deceaſe. Alſo, I give and bequeath unto "*George*, *Elizabeth*, and *Sarah*, ſon and daughters of the "above-named *George Stevens*, 10*l.* each, to be paid unto "them when they ſhall reſpectively arrive at the age of "21 years, (and if either of them die before 21, their

One deviſed thus: "Concerning my "worldly eſtate, "I give and "bequeath to "*M. M.* 1*s.* "*Alſo I give* "*and bequeath* "to *A. M.* 2*s.*" (with pecuniary bequeſts to ſeveral others in the ſame form of words); "*alſo* "*I give and be-* "*queath to* G. S. "my meſſuage "and land, &c. "in *W. Alſo I* "*give and be-* "*queath* to the "ſaid *G. S.* and "his wife all "my lands, &c. "in *B. alſo* all "my meſſuages, "&c. in *W. alſo* "all my goods, "chattels, &c. "and perſonal "eſtate, *after* "*having there-* "*out firſt paid* "*and diſcharged* "all my *debts* "*and funeral* "*expences: alſo* "*ſubject to the*

"*payment thereout all the aforeſaid legacies* And I nominate the ſaid *G. S.* to be *ſole executor.* "*whom I charge* with the payment of my debts, legacies, and funeral expences," &c. Held that *G. S.* and his wife took a fee in the real eſtate deviſed to them, by reaſon of the words "*having thereout firſt paid* all my *debts*," &c. which was a perſonal charge on them in reſpect of the realty as well as perſonalty, all deviſed in one entire ſentence, together with ſuch charge.

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" ſhare to be paid to the ſurvivor.) Alſo, I give and be-
" queath unto *George Snelling* of *Bramley* in the ſaid
" county, cordwainer, all that my meſſuage or tenement,
" malt-houſe, garden, land, and premiſes ſituate in the pa-
" riſh of *Wingrove*, in the county of *Bucks*. Alſo, I give
" and bequeath unto *the ſaid* George Snelling *and* Sarah
" *his wife* all that my meſſuage or tenement, farm, lands,
" and premiſes ſituate in *Bramley* aforeſaid: alſo, all that
" my meſſuage or tenement, garden, and premiſes ſituate
" in *Wonerſh* aforeſaid, and now in my own occupation:
" alſo, all and ſingular my goods, chattels, rights, credits,
" ready money, and *perſonal eſtate* of what nature and kind
" ſoever as I ſhall die ſeiſed and poſſeſſed of, intereſted
" in, or entitled unto, *after having thereout firſt paid and*
" *diſcharged all my juſt debts and funeral expences:* alſo ſub-
" ject *to the payment thereout* all the aforeſaid *legacies*.
" And I nominate, conſtitute, and appoint the ſaid *George*
" *Snelling* to be *ſole executor* of this my laſt will and teſta-
" ment, *whom I charge with the payment of all my juſt debts,*
" *legacies, and funeral expences.*"

The leſſors of the plaintiff are heirs in coparcenary to *Sarah Dabner* the teſtatrix. The defendant *George Snelling* is the infant ſon and heir at law of *George Snelling* the deviſee, who ſurvived *Sarah* his wife, and died in poſſeſſion of the premiſes in queſtion in *February* 1803. The other defendants are tenants in poſſeſſion of the premiſes. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover.

Lawes for the plaintiff. There being no words of limitation or inheritance annexed to the ſeveral deviſes to *George Snelling*, and to him and his wife, no more than an eſtate for life or lives paſſed by the expreſs words of the will.

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will. But it will be ſaid that the ſubſequent charge on *George Snelling* to pay the debts and legacies will carry the fee. That would be ſo, if it were a charge on him in reſpect of the realty before deviſed to him, according to the authorities, in order to enable him, if neceſſary, to ſell, and carry into effect the purpoſes of the will. But a charge for the payment of debts muſt always be conſtrued with reference to the rules of law for the payment of debts, which the teſtator muſt be taken to have had in contemplation, if he have not otherwiſe expreſſed himſelf. Where the charge therefore is in general terms upon one who is named *executor*, and to whom eſpecially the perſonal eſtate is immediately before bequeathed, it muſt be preſumed that the payment was intended by the teſtator to be made out of that fund which the law firſt appropriates to the payment of debts. It was ſo conſidered by *Groſe* J. in *Denn* d. *Moor* v. *Mellor* (*a*), where a bequeſt of the reſidue of lands and goods *after payment* of debts, &c. was holden not to carry a fee. So it was alſo ruled in *Dickins* v. *Marſhal* (*b*), *Canning* v. *Canning* (*c*), and *Merſon* v. *Blackmore* (*d*). In the latter the Maſter of the Rolls laid ſtreſs on the charge not being at all events on the realty, but only conditionally in caſe the perſonalty was not ſufficient. This is diſtinguiſhable from *Doe* d. *Palmer* v. *Richards* (*e*), which was a deviſe of the reſidue of lands and goods, the teſtator's legacies and funeral expences *being* THEREOUT *paid*. For there, the whole was one continued deviſe, in one unbroken ſentence; and it could not be taken to refer more to the perſonalty than the realty; but the word *thereout* neceſſarily over-rode both ſpecies of property. But here the realty is firſt de-

(*a*) 5 *Term Rep.* 564. (*b*) *Cro. Eliz.* 330. (*c*) *Moſ.* 249.
(*d*) 2 *Atk.* 341. (*e*) 3 *Term Rep.* 356.

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viſed in one complete ſentence; and then the perſonalty, beginning with the disjoining word *alſo*, with which the teſtator had before commenced every ſeparate bequeſt. And then *alſo* occurs again in the clauſe ſubjecting the property to the payment *thereout* of the legacies. And then *George Snelling* is by a ſubſtantive clauſe appointed ſole *executor*; in which character only the charge upon him of the payment of debts attaches; which muſt therefore be meant out of the perſonalty. So in *Hopewell* v. *Acland* (*a*), where the deviſe was, "*Item*, I deviſe my "manor of *B.* to *A.* and his heirs. *Item*, I deviſe *all* "my lands, &c. to the ſaid *A.* *Item*, I deviſe all my "goods and chattels, and *whatever elſe I have not before* "*diſpoſed of*, to the ſaid *A.*, *he paying my debts and legacies*;" and *A.* was made executor: *Trevor* C. J. ſaid, that "*Item* was a uſual word in a will to introduce new diſtinct matter; therefore *a clauſe thus introduced is not influenced by nor to influence a precedent or ſubſequent ſentence*, unleſs it be of itſelf imperfect and inſenſible without reference; and therefore not here, where both clauſes are perfect and ſenſible. But by reaſon of the concluding ſentence deviſing *what was not before diſpoſed of*, he held that *A.* took a fee." So in *Doe* v. *Holmes* (*b*), where the deviſe was of "my houſe and furniture to *A.*, whom I make executrix, ſhe paying all my debts and legacies," which was deemed to carry the fee; Lord *Kenyon* laid ſtreſs on the circumſtance that the *perſonalty* was ſeparately given to *A.* by the next clauſe in the will, viz. "I likewiſe leave to *A.* all the reſt of my perſonal eſtate." It is alſo material in this caſe that the charge is not upon the ſame perſons who take the realty: for the charge is upon *George Snelling* alone in the ſame clauſe in which he is appointed exe-

(*a*) *Salk.* 239. (*b*) 8 *Term Rep.* 1.

cutor;

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cutor; but the realty was given to *George Snelling* and his wife; and though it be there given them "*after having thereout firſt paid* the debts," &c., yet that refers to the *perſonal* eſtate which is given by the ſame clauſe: and the ſubſequent direction that the debts, &c. ſhall be paid by *George Snelling* the *executor*, ſhews in what character the charge was firſt impoſed, and out of what fund it was to be ſatisfied.

Boſanquet contrà was ſtopped by the Court.

Lord ELLENBOROUGH C. J. The queſtion is, whether *George Snelling* and his wife, the deviſees, took the fee or only an eſtate for life in the lands and premiſes in *Bramley* and *Wonerſh*. The teſtatrix, after giving ſeveral pecuniary legacies, firſt diſpoſes of her meſſuage, &c. in the pariſh of *Wingrove*, which ſhe deviſes to *George Snelling* alone. And that may probably be contended to paſs only a life eſtate to him, if any queſtion ſhould ariſe upon it. Then ſhe deviſes to *George Snelling* and his wife the premiſes in *Bramley*, *alſo* the premiſes in *Wonerſh*: thoſe two eſtates, it is to be obſerved, are diſpoſed of in the ſame continuing and entire ſentence; for the words, "*I give and bequeath*" are not repeated, and muſt neceſſarily therefore extend to the ſubſequent part of the ſentence in order to make it intelligible. The ſentence then goes on, "alſo all and ſingular my goods, chattels, &c. and perſonal eſtate of what nature and kind ſoever as I ſhall die *ſeiſed* and *poſſeſſed of*," &c. Here again the continuity of the ſentence is evinced; for having firſt deviſed the realty and then the perſonalty, the word *ſeiſed* appears to have been uſed as applicable to the realty, and *poſſeſſed* as applicable to the perſonalty. And then the ſentence,

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after diſpoſing of both ſpecies of property, concludes thus; "*after having thereout firſt paid and diſcharged all my juſt debts and funeral expences; alſo ſubject to the payment thereout*" (repeating again the word *thereout*) "*all the aforeſaid legacies.*" The queſtion then is, whether the fee be not given by neceſſary implication from theſe concluding words, which impoſe a charge upon the deviſees of the payment of debts, legacies, and funeral expences, which a leſs quantum of eſtate might not be ſufficient to ſatisfy. I take the rule to have been laid down by Lord *Kenyon*, in *Doe* v. *Mellor*, and *Doe* v. *Holmes*. The queſtion has always been, whether the charge is to be paid only out of the rents and profits of the eſtate, or whether it is to be paid by the deviſee at all events. Where debts or annuities are to be paid by the deviſee at all events out of the eſtate in his hands, the deviſee muſt take a fee; otherwiſe the charge might be greater than the eſtate deviſed, and he would be a loſer. For if he only took an eſtate for life, the debts, &c. might be payable before the rents became due, and he might not live long enough to reimburſe himſelf. But where the charge is only payable out of the rents and profits, there the deviſee cannot be a loſer, as he cannot be chargeable with more than he has received. The diſtinction therefore turns on this; whether the charge be on the *perſon* of the deviſee, or only on the *property* deviſed. Now here the eſtate is deviſed to the deviſees with a direction *thereout* to pay debts and funeral expences. That brings the queſtion to the grammatical conſtruction of the ſentence, "*after having* "THEREOUT *firſt paid and diſcharged all my juſt debts and* "*funeral expences: alſo ſubject to the payment* THEREOUT "*all the aforeſaid legacies.*" The payment thereout is to be made *by the deviſees*; and the word "*thereout*" means

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out of the property before given to the deviſees. What then was the property before given? All at leaſt which was before included in the ſame ſentence. And in order to make it ſenſe we muſt read it as one entire ſentence, beginning at the words, "alſo, *I give and bequeath* unto "the ſaid *George Snelling*, and *Sarah* his wife," &c.; for the words "*I give and bequeath*" occur only once. If then the ſentence include the real as well as perſonal property, and the debts are to be *thereout* paid *by the deviſees*, it differs this from the caſe of *Doe* v. *Mellor* (*a*), and that claſs of caſes where the land is deviſed only *after payment* of debts: for there the thing itſelf is not given to the deviſee till after thoſe charges have been firſt ſatisfied. But where *the deviſee* is to pay the charge *out of* the land, he muſt firſt take the intereſt in the land. This brings the caſe within that of *Doe* v. *Richards* (*b*), the doctrine and principle of which is right, though perhaps the words to which it was applied will hardly ſuſtain the application, as was conſidered by many of the Judges on the deciſion of the caſe of *Moor* v. *Mellor* (*c*), in the Houſe of Lords. That was a deviſe of lands, "his legacies and funeral expences *being thereout* paid:" and thoſe words were holden to carry the fee, being conſidered the ſame as if the deviſor had ſaid "being *by him* (the deviſee) *thereout* paid." And if thoſe words had been added the application of the doctrine would unqueſtionably have been right. The doctrine, however, has been long eſtabliſhed. In *Merſon* v. *Blackmore*, the Maſter of the Rolls ſays that "where a groſs ſum is to be paid out of the lands, to be ſure it gives a fee to the deviſee of thoſe lands." In *Doe* v. *Holmes* (*d*) the deviſor gave his houſe and furniture to one

(*a*) 5 *Term Rep.* 558., and 2 *Boſ. & Pull.* 247.
(*b*) 3 *Term Rep.* 356. (*c*) 2 *Boſ & Pull.* 252. (*d*) 8 *Term Rep.* 1.

whom

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whom he made executrix, "*ſhe paying* all his debts and legacies." Lord *Kenyon* ſaid that the deviſee was bound to pay the debts and legacies at all events, and the charge was thrown on her in reſpect of the real eſtate. The ſentence here is not framed as in *Hopewell* v. *Ackland* (*a*). There each ſentence beginning "*Item, I deviſe,*" &c. was complete and diſtinct in itſelf; and the words "he paying my debts and legacies" included under the laſt item, was more disjointed from the preceding items than in this caſe, where it is all coupled together with the deviſe of the realty, in one ſentence. Then the only remaining queſtion is, Whether the ſubſequent appointment of *George Snelling* to be ſole executor, and charging him with the payment of all the debts, legacies, and funeral expences, can make any difference, the deviſe of the land having been before made to him and his wife with the ſame charges upon them? I cannot conſider theſe words as importing that he ſhould do more than the law would have required of him if the words had not been added. And upon the whole, I am clear that the debts, &c. were perſonal charges upon the deviſees in reſpect of the property deviſed to them, and that they muſt take an eſtate commenſurate with the charges, which they cannot be certainly aſcertained of without taking a fee in the lands.

Grose J. The word *thereout* impoſes a duty on the deviſees to pay the debts and legacies thrown on them in reſpect of the property out of which they were required to pay them. I doubt whether by the word *alſo* the teſtator did not mean *and*. The ſentence would then read thus, (after giving the eſtate in *Buckinghamſhire* to *George Snelling* alone): "Alſo I give and bequeath unto the ſaid

(*a*) *Salk.* 239.

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" *G. S.* and *Sarah* his wife all that my meſſuage, &c. in " *Bramley; and* (vice *alſo*) all that my meſſuage, &c. in " *Wonerſh*, &c. *and* (vice *alſo*) all and ſingular my goods and " chattels, &c. *after having thereout firſt paid my juſt debts*," &c. It would then be read as one plain ſentence, by which the realty and perſonalty would be deviſed, the deviſees paying *thereout* the teſtator's debts, &c.; and therefore, according to caſes well known, the deviſees would be bound to pay the debts out of the real as well as the perſonal property; and both deſcriptions of property having been given to the huſband and wife, the teſtator, in directing that his debts ſhould be *thereout* paid, muſt have meant that they ſhould pay them out of both thoſe deſcriptions. As to the appointment of the huſband alone to be executor, and charging him again with the payment of the debts, &c. nothing can be collected from thence to ſhew a different intent in the deviſor. The intereſt was given to both huſband and wife, and as the huſband would take an intereſt in the property given to his wife, and he was probably regarded as the perſon who would take on himſelf the active duty, it was natural to impoſe on him the burthen of the executorſhip, and the payment in fact of the ſeveral charges. But it is clear that the realty was meant to be charged as well as the perſonalty. Then ſaying that the deviſees took a fee in reſpect of ſuch charge is, I believe, giving effect to the real intention of the teſtatrix. For where an eſtate is given to a party without limiting it for his life or other definite period, it is pretty generally conſidered, by perſons not acquainted with the rules of law, that the whole intereſt of the teſtator paſſes; and here we do find words in the will which may carry that intention into effect conſiſtently with law.

LAWRENCE

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LAWRENCE J. The diſtinction which runs through the caſes ſeems to be this, that if an eſtate in land be given *after payment* of debts or legacies, it is of no conſequence for this purpoſe whether the deviſee take the eſtate for life or in fee; for the land will be charged into whatever hands it may paſs, and the purpoſes of the deviſor will equally be anſwered. But where an indefinite eſtate is given to a perſon in lands, and that *perſon* is charged with the payment of debts or legacies, he muſt take a fee; for otherwiſe, if he take only for life, and pay the charges, and die ſoon after, he may be a loſer, which the deviſor could never have intended. It is the ſame thing if ſuch indefinite eſtate be given to one, and the debts are to be paid *out of the eſtate* given to the deviſee. he muſt there alſo take the fee; for otherwiſe the *eſtate* may not be ſufficient to pay the debts. This was eſtabliſhed in the caſe of *Doe* v. *Richards*, where Lord *Kenyon* relied on the words, "my legacies and funeral expences being *thereout* paid," as giving a fee; aſſigning this reaſon, "for the fund which is "to anſwer thoſe demands ought to be as ample as poſſi- "ble." And again, in *Goodright* d. *Baker* v. *Stocker* (*a*), where one deviſed to his grandſon *J. B.* a dwelling-houſe, "paying yearly *out of the ſaid dwelling-houſe* 15*s.* to his "grand-daughter *A. H.*;" there the words "paying "yearly *out of* the ſaid dwelling-houſe," &c. were deemed to carry the fee, becauſe the annuity to *A. H.* might continue longer than the life of the deviſee. Then the queſtion is, whether the debts and legacies here be not payable out of the real eſtate deviſed to *George Snelling* and his wife? It is contended, that they are only payable out of the perſonal eſtate, upon the authority of the caſe of *Hopewell* v. *Ackland*. But there the ſeveral deviſes of the

(*a*) 5 *Term Rep.* 13.

real

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real and perſonal eſtate were diſtinct and independant. Here the words carrying the perſonal eſtate do not conſtitute by themſelves a perfect ſentence: they require a verb: and therefore to make them intelligible they muſt be read altogether as one ſentence with the antecedent branch which has the verb, "alſo *I give*," &c. Therefore I agree with my brother *Groſe* in thinking that *alſo* at the commencement of the bequeſt of the perſonalty means no more than *and*. Then for the meaning of the word *thereout* ("after having *thereout* firſt paid," &c. and "alſo ſubject to the payment *thereout*," &c.) we muſt look to the whole of the antecedent part of the ſentence, and that refers to the *real* as well as the *perſonal* eſtate given. But it is ſaid, that at the concluſion of the will *George Snelling* only is charged with payment of the debts and legacies: but that is only what the law would have implied ſo far as reſpects the perſonalty from his character of executor, and the expreſs mention of it cannot have the effect of altering the eſtate which was before given him. The real and perſonal eſtate had been before given to him and his wife by a diſtinct clauſe, charged with the payment of debts and legacies out of it. The huſband then was made as it were what is called, and was not uncommon in old wills, a ſupervifor of the will, to ſee thoſe things done which were before charged on the eſtate given to him and his wife. A queſtion might indeed be raiſed whether he did not take a fee in the whole, as well in that eſtate which was given to him alone in another clauſe, as in that which was given to him and his wife jointly, if he alone were perſonally charged with the payment of debts and legacies in reſpect of every thing before given to him: but I do not give any opinion on that point; it is enough in this caſe to ſay, that he and his

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wife took a fee in the lands in queſtion, which were liable *in his and his wife's hands* for the payment of the debts and legacies.

Le Blanc J. According to all the determinations, the queſtion, whether the deviſee take the fee or not in reſpect of charges, muſt depend on this, whether *he perſonally*, or the eſtate given *to him*, be charged with the payment of debts; or whether the *eſtate* be given *after* payment of debts? If the deviſee be perſonally charged with the payment of debts, or if the debts be charged on the quantum of eſtate given to the deviſee, he muſt take the fee; otherwiſe if he only take for life he may be a loſer, or the eſtate may be inſufficient. Here the deviſe of the eſtates in queſtion, and alſo of the perſonalty, is all contained in the ſame clauſe; for the words, "*I give and bequeath*," are not repeated before that branch of it diſpoſing of the perſonalty; and then the clauſe concludes with charging *the deviſees* with payment *thereout* of the debts and legacies. The words are, "after *having thereout* firſt paid," &c. Thoſe words are ſtronger than the words, "my legacies, &c. *being thereout* paid," which occurred in *Doe* v. *Richards* (*a*). For "after *having*," &c. means "after *they* ſhall *have thereout* paid," &c., namely, *G. Snelling* and his wife, to whom the property was given. The debts, &c. therefore became a perſonal charge upon the deviſees, who were required to pay them out of the property deviſed to them. And what that property was can only be aſcertained by referring back to the beginning of the ſentence, where the teſtatrix uſes the words, "I give and bequeath," without which the ſentence cannot

(*a*) 3 *Term Rep.* 356.

be

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be perfected. The laſt clauſe is then reſorted to, in order to ſhew that the teſtatrix only meant to charge *G. Snelling* the huſband, in reſpect of the perſonalty, as *executor*. But according to my conſtruction ſhe had before ſpecifically charged the deviſees of the real property in queſtion with the payment of debts and legacies, and they were therefore chargeable in reſpect of it, if the perſonalty had not been found ſufficient. In order to make the latter part of the will conſiſtent with the former, it muſt be taken as a direction to her executor to ſee thoſe things done which ſhe had before directed to be done. As well therefore on the authority of the caſes referred to as alſo on that of *Baddeley* v. *Leppingwell* (*a*), I think that the deviſees took a fee. In the latter caſe the deviſe was to *S. B.*, "*ſhe paying thereout* 40*s.* a year to her ſiſter *E. B.*" This was conſidered as a deviſe of an annuity of 40*s.* a year, to be paid by the deviſee to the ſiſter for life, and that it carried the fee to the deviſee, who was charged with that annuity.

Poſtea to the Defendants (*b*).

(*a*) 3 *Burr.* 1533. (*b*) Vide *Goodtitle* v. *Maddern*, 4 *Eaſt*, 496.

BARING and Others *againſt* The ROYAL EXCHANGE Aſſurance Company.

Friday, April 27th.

Where a foreign Court of Prize profeſſes to condemn a ſhip and cargo on the ground of an *infraction of treaty*, in not being properly documented, &c as required by the treaty between the captors and captured; ſuch ſentence is concluſive in our courts againſt a *warranty of neutrality* of ſuch ſhip and cargo in an action upon a policy of inſurance againſt the underwriter; although inferences were drawn in ſuch ſentence from ex parte ordinances in aid of the concluſion of ſuch infraction of treaty.

THIS was an action againſt the underwriters on a policy of aſſurance for 5000*l.* on goods, being one half of the cargo, *warranted* American *property*, on board the

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Roſanna, warranted an American *ſhip*, from *Surinam* to *London, Rotterdam, Amſterdam*, or *Hamburgh*, with liberty to touch at *Guernſey*, or one port in the Channel. The policy was effected by the plaintiffs as agents of *N. Sargent*, in whom the intereſt was averred to be, at a premium of ten guineas per cent. The declaration averred a loſs by capture; and the defendants pleaded the general iſſue. At the trial before Lord *Ellenborough* C. J., at *Guildhall*, the jury found a verdict for the plaintiffs for 5000*l.*, ſubject to the opinion of the Court upon the following caſe:

On the 7th of *September* 1796, the *Roſanna*, an *American* ſhip, ſailed from *Surinam* on the voyage inſured, with her cargo, the property of *N. Sargent*, who was admitted to be an *American*, unleſs the *French* ſentences of condemnation hereinafter ſtated preclude the plaintiffs from proving him ſuch. On the 23d of *October* 1796 ſhe was captured by a *French* privateer, and carried into *Rochelle*. At that place proceedings were inſtituted againſt the ſhip and cargo before the Tribunal of Commerce; which adjudged both to be reſtored to the owners. But on appeal by the captor the Court of Appeal reverſed the former ſentence, and condemned the ſhip and cargo. [Here was introduced the *French* ſentence, which began with an exordium on the duty of neutrals to ſubmit themſelves to the maritime laws, and referring to the *French* ordinances of 1704, 1744, and 1778, and declaring that their authority was recogniſed by the law of the 14th of *February* 1793, and the arret of the Directory of the Executive Power of the 12th *Ventoſe*, after which the ſentence proceeded as follows:] "Conſidering that the treaty between *France* and the *United States*, of the 6th of *February* 1778, contains no clauſe contrary to the foregoing ordinances,

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and that they are of courſe binding on both the *Americans* and other nations: conſidering that *J. P.*, captain of the *Roſanna*, has not produced a liſt of the crew ſigned by the marine officers of the port of *New York*, from whence he ſailed: conſidering that it is not poſſible to give credit to what he has ſaid, that in his country there is no public officer appointed to certify the liſts of crews, ſince in the treaty of 1778, between *France* and the *Americans*, mention is made of marine officers to whom captains of *American* ſhips are bound to tranſmit the liſts of their crews, and to fulfil ſuch other formalities as are inſerted in the 25th article of the ſaid treaty: conſidering it poſſible to admit that the ordinance of the 26th of *July* 1778, and the preceding ones, could not be oppoſed to the *Americans*, under pretence that the regulations therein contained had not been recogniſed in the aforeſaid treaty, it is at leaſt indiſputable that they ought to fulfil the obligations which this treaty preſcribed to them, and that by not doing ſo they ſubject themſelves to the penalty of confiſcation: Now by the 25th article of the ſaid treaty it is agreed, in order to remove and to prevent, on both ſides, diſſentions, in caſe either of the two parties ſhould be engaged in a war, that the veſſels belonging to the ſubjects or people of the other ally muſt be provided with ſea-letters or paſſports, which ſhall expreſs the name, the property, and the burden, as alſo the name and reſidence of the maſter of the veſſel, in order that it may thereby appear that ſhe really belongs to the ſubjects of one of the two contracting parties; which paſſport muſt be expedited according to the model annexed to the preſent treaty. The terms of this model, and the formalities to be obſerved by thoſe who are bound to take them, are as follows: "The maſter of the ſhip ſhall tranſmit to the officers of marine a liſt,

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ſigned and atteſted by witneſſes, containing the names and ſurnames, places of nativity and of abode of the perſons who compoſe the crew of his ſhip, and of all thoſe who ſhall embark therein, &c. (It then negatived that the captain had tranſmitted the liſt or roll of the perſons who compoſed his crew to the marine officers of *New York*, or cauſed it to be atteſted by witneſſes; which was an infringement of the treaty.) Conſidering that it was neceſſary to ſtipulate theſe formalities, becauſe they ſerve to prove whether the crew is compoſed of friends or enemies; and that in this point of view, ſo far from being contrary to the ordinances of 1704, 1744, and of 1778, they refer to and implicitly recognize them: conſidering that it is not ſufficient for the captain of the *Reſolva* to aſſert his having tranſmitted the liſt of his crew to the marine officers of *New York*; that he is not obliged to have a duplicate thereof; and that his paſſport is ſufficient to prove his neutrality, without producing a duplicate of the liſt in queſtion, atteſted and certified by the marine officers, or by a certificate ſigned by them: becauſe if the bare production of his paſſport were ſufficient to prove his having conformed to the law, the two nations would never have made the putting of the liſt of the crew into the hands of public officers an expreſs condition, &c. and every clauſe in a treaty ought to be carried into execution: conſidering that the pretended liſt of the crew produced by the captain and *Sargent* is a nullity, not being ſigned by any perſon, nor atteſted by any witneſſes, and not being drawn up with any of the formalities which can give it credit or authenticity: conſidering that this pretended liſt of the crew was not tranſmitted to the marine officers at *New York*, and that it could ſo little avail the captain and *Sargent* in covering the fraud whereby

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they have rendered themſelves culpable; becauſe the ſame liſt certifies that of the 18 men who compoſe it, four were taken at *Surinam* and ſeven at *London*; from whence it follows that this crew was not found at *New York* with the approbation of the marine officers of that place, and that being compoſed of more than one third enemies, contrary to the expreſs tenor of the regulations of 1704 and 1778, the capture of the ſhip *Roſanna* is juſt and lawful: conſidering that upon the ſuppoſition that the captain had loſt, during his voyage, part or the whole of his crew, and that he had been obliged to recruit it either at *Surinam* or *London*, he ought at leaſt, conformably to the 10th article of the regulations of 1704, to prove by a a public act the neceſſity he was under of forming a new crew; and not having done ſo is acting contrary to the law, and, conſequently, that the capture of his ſhip is valid: conſidering, laſtly, that although the captain prove that his veſſel is *American*, that her cargo belongs to *Sargent*, an *American*, and her ſupercargo; that is not ſufficient in the eyes of the law to reſtore his ſhip; becauſe he has not fulfilled the neceſſary formalities; becauſe he has infringed on the 9th article of the ordinance of 1704, as well as the treaty in the month of *February* 1778, in not having the liſt of the crew drawn up with the preſcribed formalities; and becauſe the liſt of the crew is formed of men, more than one third of whom are enemies to the *French* Republic." It then proceeded to reverſe the ſentence of the Court below; "declaring the capture of the ſhip *Roſanna* good and valid." From this ſentence there was an appeal to the tribunal of caſſation; by which Court the ſentence of condemnation was ultimately affirmed. It was admitted that the above three courts were proper prize courts. The caſe then let o

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the 25th and 27th articles of the treaty of 1778 between *America* and *France*, and the form of the paſſport referred to in that treaty.

The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court ſhould be of that opinion, the verdict to ſtand; but if the Court ſhould be of opinion with the defendants, then the verdict to be entered for the defendants.

Puller, for the plaintiffs, ſaid, that this caſe was brought forward by the defendants, in order to review the deciſion in *Bird* v. *Appleton* (*a*), which he contended was directly in point with the plaintiffs. The *French* ſentence of condemnation in that caſe is not ſet out in the report, which only ſtates generally that the deciſion proceeded entirely on the ground that ſome of the *French* ordinances had been violated. But in truth there is the ſame reliance on the *French* ordinances in the preſent caſe as there was there, mingled in both caſes with references to the treaty between *America* and *France*. And there it was expreſsly holden that the warranty of neutrality as an *American* was not falſified by the ſentence of the *French* Court condemning the ſhip for navigating without the documents required by the *French* ordinances; although, in that caſe as well as here, the ſentence profeſſed to decide againſt the neutrality of the ſhip for want of proper documents.

Lord ELLENBOROUGH C. J. (ſtopping the argument.) Does not this ſentence of condemnation proceed ſpecifically on the ground of *infraction of treaty* between *America* and *France*, in the ſhip not having thoſe documents with which,

(*a*) 8 *Term Rep.* 562.

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in the judgment of the *French* Court, the *American* was bound by treaty to be provided? I do not ſay that they have conſtrued the treaty rightly; on the contrary, ſuppoſe them to have conſtrued it ever ſo iniquitouſly, yet, having competent juriſdiction to conſtrue the treaty, and having profeſſed to do ſo, we are bound by that comity of nations which has always prevailed amongſt civilized ſtates to give credit to their adjudication where the ſame queſtion ariſes here upon which the foreign Court has decided. After arguing for hours we muſt come to the ſame concluſion at laſt, that the *French* Court has ſpecifically condemned the veſſel for an infraction of treaty, which negatives the warranty of neutrality. Then having diſtinctly adjudged the veſſel to be good prize upon a ground within their juriſdiction, unleſs we deny their juriſdiction, we are bound to abide by that judgment. Wherever a caſe occurs of a condemnation by a foreign Court on the ground of ex parte ordinances only, without drawing inferences from them to ſhew an infraction of treaty between the nation of the captors and captured, and referring the judgment of the Court to the breach of treaty, I ſhall be glad to hear the caſe argued; whether ſuch ordinances are to be conſidered as furniſhing rules of preſumption only againſt the neutrality, or as poſitive laws in themſelves, binding other nations proprio vigore.

GROSE J. The *French* Court have here decided upon the fact of neutrality, which they negative by their ſentence.

LAWRENCE J. If this caſe could raiſe the queſtion, Whether a condemnation of a neutral ſhip ſpecifically for the breach of *French* ordinances could negative a warranty

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ranty of her neutrality, I ſhould wiſh to have it turned into a ſpecial verdict, in order to have that point decided by the dernier reſort. But no ſuch queſtion can be raiſed where the *French* Court have profeſſed to decide on an infraction of treaty, however they may refer to their own ordinances in coming to that concluſion. In *Bird* v. *Appleton* the Court, (whether properly or not I will not now inquire,) did not conſider the ſentence of condemnation there relied on as negativing the warranty of neutrality. For we have always ſaid that if the foreign Court have decided expreſsly on the queſtion of neutrality, we ſhould hold ourſelves bound by their deciſion. [After referring to *Bird* v. *Appleton*] I do not ſay that the ſentence in that caſe may not have been miſunderſtood by us; but we certainly decided it on the ground that it was a condemnation proceeding ſolely on the *French* ordinances.

LE BLANC J. It has been long ſettled that foreign Courts of Admiralty may decide upon the conſtruction of treaties. And if they expreſsly condemn a prize for a breach of treaty, that is binding on our Courts where the ſame queſtion ariſes upon the propriety of that condemnation.

Park was to have argued for the defendants.

Poſtea to the Defendants.

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Monday, April 30th.

BORDENAVE *againſt* GREGORY.

THE firſt count of the declaration ſtated that the plaintiff, on the 5th of *May* 1803, at, &c. was poſſeſſed of 1000*l.* ſtock 3 per cents, the ſaid ſtock, together with other capital ſtock of the plaintiff, then ſtanding in his name in the books of the Bank of *England;* and the plaintiff being ſo poſſeſſed, afterwards ſold to the defendant the ſaid 1000*l.* ſtock for 69¾*l.* per cent., and then and there promiſed the defendant *that he* (the plaintiff) *would transfer the ſaid* 1000*l. ſtock to the defendant in the ſaid books of the Bank upon payment by the defendant of the ſaid price for the ſame, when the plaintiff ſhould be thereto afterwards requeſted;* and *in conſideration of the premiſes, the defendant then and there promiſed the plaintiff to accept the ſame ſtock,* and pay for the ſame at the rate aforeſaid, *when the defendant ſhould be thereunto afterwards requeſted.* The plaintiff then averred *that he was ready and willing and offered to transfer the ſaid* 1000*l. ſtock to the defendant according to the form and effect of the ſaid contract, upon payment by him of the ſaid price for the ſame,* and *then and there requeſted the defendant to accept the ſame ſtock and pay the ſaid price,* &c. yet the defendant would not, *when ſo requeſted, or at any time,* accept the ſaid 1000*l.* ſtock, or pay the price, &c.; but then and at all times omitted and refuſed ſo to do, &c.; by reaſon whereof the plaintiff was obliged to ſell and transfer, and has ſold and transferred the ſaid 1000*l.* ſtock for a leſs price than that for which he had ſold the ſame to the defendant, viz. at 64*l.* per cent., being the beſt price he could obtain for the ſame, to the plaintiff's

In an action on the caſe for not accepting ſtock agreed to be transferred on requeſt, an averment that the plaintiff was ready and willing to transfer, and requeſted the defendant to accept the ſtock, which he refuſed, can only be ſatisfied by ſhewing an actual tender and refuſal, or that the plaintiff waited at the Bank on the day when it was underſtood that the transfer was to be made, until the cloſe of the transfer books, which was the lateſt time when the transfer could be made. Semble that in ſuch an action it is not neceſſary by the ſtat. 7 *Geo.* 2 *c.* 8. *ſ.* 6. for the plaintiff to ſhew that he transferred the ſtock to another at the *next* poſſible transfer day after default made by the original contractor, provided the ſtock were transferred before the action brought: though, if the plaintiff might have obtained more for the ſtock by a ſale on any intermediate day between the original default and the actual ſale, that will go in reduction of the damages ſuſtained by the plaintiff by ſuch default.

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plaintiff's damage of ſo much, &c. At the trial at *Guildhall* before Lord *Ellenborough* C. J., at the Sittings after *Hilary* Term laſt, the evidence, ſo far as it was material to raiſe the queſtions made, was that the contract for the ſale of the ſtock was made on the 5th of *May* 1803, a little before 12 o'clock at noon; but there was no proof of any direct application made to the defendant to accept the ſtock on that day, nor was it ſhewn that the plaintiff had waited till the cloſing of the transfer books at the Bank for the defendant to appear and accept the transfer of it. But a few days afterwards an offer was made of the ſtock, which was then refuſed to be accepted by the defendant, alleging that the contract had been made under an impreſſion of the truth of certain public intelligence of peace, communicated to the Lord Mayor, which afterwards turned out to be a forgery; in conſequence of which a reſolution had been entered into by the members of the Stock Exchange that all bargains made on that day ſhould be reſcinded (*a*). And in conſequence of the defendant's refuſal the ſtock was afterwards ſold at an inferior price on the 12th of *May*, there having been no intermediate riſe of the funds between the 5th and the 12th. After a verdict for the plaintiff for the difference, two queſtions, which had been made at the trial, were again raiſed on a rule for ſetting aſide the verdict, 1ſt, Whether it were not incumbent on the plaintiff, in ſupport of the allegations in his declaration, to prove either an actual tender of the ſtock and offer to transfer it on the 5th of *May*, the day on which it was contracted for; or that which was an equivalent in law, namely, that the plaintiff waited till the laſt moment of the day when the transfer books at the Bank were cloſed ready to have made the

(*a*) *Vide* the caſe of *Heckſcher* v. *Gregory*, 4 *Eaſt*, 608.

transfer,

transfer, if any perſon had been preſent on the part of the defendant to have accepted it? 2dly, Whether, in order to entitle the plaintiff to recover, it were not neceſſary for him by the ſtat. 7 *Geo.* 2. *c.* 8. to ſhew an actual transfer to ſome other on the *next* transfer day, (which was the 6th)? and whether a transfer on the 12th were ſufficient, not having been made as ſoon as it might? With reſpect to this laſt queſtion,

The Court reſerved it for future conſideration, when it might be put in a more ſolemn courſe of inveſtigation in the ſhape of a ſpecial verdict, or upon a bill of exceptions. But the majority of the Judges were inclined to conſider, that the act of parliament did not require as a condition precedent to maintaining the action for damages for not performing a contract to purchaſe and accept ſtock, that the proprietor ſhould, on the defendant's neglect or refuſal to accept the ſtock, have ſold it to another on or before the *next* transfer day after ſuch default: but it merely ſays, that it ſhall be lawful for him to *ſell* ſuch ſtock, not ſaying *when*. And it was ſufficient, they intimated, if the ſtock were ſold and transferred at any time prior to the commencement of the action againſt the defendant who had ſo made default: eſpecially where due diligence had been uſed by the proprietor, as the jury had found in this caſe. Though if the ſtock had riſen in value in the intermediate time between the default of the defendant and the time when the ſtock was actually ſold and transferred, ſo that the plaintiff might have obtained a higher price than that for which it was actually ſold, but leſs than the price contracted for by the defendant, they thought it material for the conſideration of the jury in aſſeſſing the damages; becauſe the ſtatute 7 *Geo.* 2. *c.* 8.

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ſ. 6. directs, that the party injured ſhall recover from the perſon who firſt contracted for the purchaſe of the ſtock "all the *damage* which ſhall be *ſuſtained thereby*," that is, from his default; and the *damage* to be *ſuſtained thereby* does not neceſſarily mean the difference of the price on the day of the actual ſale, and that for which it was contracted to be ſold. For if he might have obtained more at any intermediate time, he may not be ſaid to have *thereby ſuſtained*, (that is, by the default of the defendant,) the damage which he incurred by waiting, but by his own default. The jury therefore were in each caſe to inquire whether the plaintiff might not have ſold ſooner than he did, and thereby ſaved part of the loſs.

As to the firſt queſtion, *Garrow* and *Gibbs*, in ſupport of the rule, referred to the caſe of *Lancaſhire* v. *Killingworth* (*a*), where in covenant for not accepting ſtock of the *Hudſon's Bay* Company, *at the Company's houſe*, on a certain notice, the plaintiff averred that he gave the notice to the other party to come to *the Hudſon's Bay houſe* and accept the ſtock, and that the plaintiff *was ready there at the day*, and offered to transfer it, but that the other party did not come to accept it, nor had paid the price agreed, &c. And upon demurrer the declaration was holden ill; for where the party to whom the act is to be done does not come at the time and place appointed, the other ought to ſhew that he came at the laſt time of the day which the law has appointed for the doing of the act; and if he came there before, he ought to ſhew that he continued there to the laſt time. And that as the ſtock could only be transferred when the Company's houſe was

(*a*) 1 *Ld. Ray.* 636. *Com. Rep.* 116. 2 *Salk.* 623. 3 *Salk.* 343. and 12 *Mod.* 549.

open,

open, which was at ſtated hours of the day, the plaintiff ſhould have averred the uſage of the Company in that reſpect, and that he came there at the proper time, and ſtaid there till after the houſe was ſhut. Here there was no ſuch averment, nor evidence of the fact.

Erſkine and *Richardſon* ſhewed cauſe againſt the rule, and endeavoured to diſtinguiſh this from the caſe cited; for there the queſtion of a legal tender aroſe upon a demurrer to the declaration, and here it ariſes after verdict (*a*), upon an averment of a tender and *refuſal*, which latter was there omitted. And here there was evidence to go to the jury that the defendant would not accept the ſtock then or at any time; for on a day ſubſequent, when there was a direct tender and refuſal, the defendant made no objection to take the ſtock on the ground that it was not properly tendered to him on the day, but aſſigned another reaſon, which ſhewed that he conſidered the contract as not binding upon him at all. And to enforce the ſtrict rule of law with reſpect to tenders on ſuch occaſions would in moſt inſtances render redreſs impracticable for breaches of contract in theſe caſes. Beſides, the caſe cited was one of a contract to be performed at a ſpecified time and place; which is not ſo here, where the contract, as alleged, was to be performed on requeſt (*b*), which muſt be underſtood of a reaſonable requeſt; and

(*a*) *Vide* the Report of the caſe cited in *Salk.* 623.

(*b*) In another caſe of the ſame kind, of *Bordenave* v. *Bartlett*, which came on upon a ſimilar rule immediately after this caſe, the evidence appearing to be, that the ſtock was contracted to be transferred *on a certain day*, and the averment in the declaration being the ſame as in this caſe, that it was to be transferred *on requeſt*, the Court ſaid, that if the objection had been taken at the trial there muſt have been a nonſuit; and on that ground the rule for a new trial was made abſolute.

here

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here there was evidence of a direct requeſt after the 5th of *May*, and a refuſal.

Lord ELLENBOROUGH C. J. The plaintiff cannot ſuſtain the action without ſhewing a tender of the ſtock and a refuſal, or that which in law is tantamount to a tender and refuſal. That muſt be by ſhewing either an actual tender and refuſal, which is not pretended to have been done in this caſe till after the 5th of *May*; or by ſhewing that the plaintiff ſtaid at the Bank to the laſt time of that day when a tender could have been made, which was ſo long as the transfer books remained open, and that he was there ready to have transferred if the defendant had been there, and would have accepted the ſtock. From the nature of the contract, it is evident that it was meant to be performed on the day on which it was made, for the price was calculated accordingly, and the only place where the tranſfer could be made was at the Bank. The plaintiff therefore ought to have ſhewn that he had done every thing as far as in him lay towards the execution of the contract, according to the caſe cited, by waiting till the final cloſe of the transfer books at the Bank on that day, which would have been a ſufficient ſubſtitution of the more formal evidence of an actual tender and refuſal. But here there was neither a tender in fact nor in law.

The other Judges concurred on this point.

Rule abſolute.

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The KING *againſt* The Inhabitants of ELTHAM.

Wedneſday, May 2d.

An order of juſtices removing *M. F. wife of P. F. a Scotchman*, who never gained a ſettlement in *England*" and their children to the place of *her* laſt legal ſettlement; which order was made upon the face of it to be made on *examination of the husband*, and *with the conſent of him and his wife*; was holden good.

AN order of two juſtices for the county of *Surry* ſtated that complaint had been made to them by the churchwardens, &c. of the poor of the pariſh of *St. George the Martyr, Southwark*, in the ſaid county, " that *Mary Finn, wife of* Peter Finn, *who is a* Scotchman, *and who never gained a ſettlement in* England, with their three children, (naming the infants), &c. had lately come to inhabit in the ſaid pariſh; not having gained a legal ſettlement there, &c. (in the uſual form), and that *upon examination of* Peter Finn, and of the ſaid *Mary his wife*, on oath, &c. and upon other circumſtances, the ſaid juſtices adjudged that the pariſh of *Eltham*, in the county of *Kent*, was the laſt legal ſettlement *of the ſaid* Mary *and her three children*," and directed the removal of the ſaid *Mary* and her children accordingly to *Eltham*, " *by the mutual conſent of the ſaid* Peter *and* Mary *his wife*." Againſt this order there was an appeal, which was afterwards diſmiſſed by the Seſſions, without ſtating any caſe upon it. And both theſe orders having been removed into this Court by certiorari, objection was taken by

E. Morris, that the wife was removed by the order of the juſtices from her huſband, who was ſtill living, and probably in the very pariſh from whence ſhe and the children were removed, and whoſe aſſent to their ſeparation, even if it could be preſumed in favour of the order, was invalid. *Marſhall* v. *Rutton* (*a*). In *St. Michael* v. *Nanny* (*b*), the Court ſaid that if the huſband were in the pariſh from whence

(*a*) 8 *Term Rep.* 545. (*b*) 1 *Stra.* 544.

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the wife was ſent, it would vitiate the order. Now that fact is to be collected in this caſe; for he is ſtated to have been examined before the magiſtrates, and to have given his conſent to the removal. [*Lawrence* J. How does it appear that the huſband was living in the pariſh of *St. George the Martyr?* He might have been before the magiſtrates without reſiding there. The order only ſtates that the wife and children were come to inhabit in that pariſh.]

Lord ELLENBOROUGH C. J. Independent of the laſt-mentioned objection, what doubt is there in the caſe? A *Scotchman*, who has no ſettlement of his own, and is deſirous to give his wife and children the benefit of hers, being unable to maintain them, conſents that ſhe ſhould be ſent to her pariſh, to which ſhe herſelf is willing to go. Why ſhould he not conſent? This is nothing like the contract of ſeparation declared to be illegal in *Marſhall* v. *Rutton*. Servants, and other perſons of that deſcription, members of the ſame family, who are to ſubſiſt by their labour, muſt frequently ſeparate for that purpoſe. Here there is neither a private nor a public injury, and there is no law againſt it.

Per Curiam, Rule diſcharged, and both Orders affirmed.

Lawes and *Wetherell* were to have argued in ſupport of the orders.

WALLACE and Another *againſt* SMITH, Treaſurer of the WEST INDIA DOCK Company.

Thurſday, May 3d.

THIS was an action on the caſe, wherein the declaration ſtated that the Directors of the *Weſt India Dock* Company had, by virtue of the ſtatutes in that caſe made, provided certain navigable docks, with quays, and warehouſes adjoining attached to the ſame, upon a certain tract of land called the *Iſle of Dogs*, for the reception and diſcharge of ſhips in the *W. I.* trade. That the plaintiffs, at the times of the ſeveral grievances aftermentioned, and for ten years before, had been brokers or agents employed by divers owners or conſignees of baggage, preſents, and ſtores, arriving in ſhips from the *W. I.*, in taking out the neceſſary cuſtom-houſe documents for unſhipping the ſaid baggage, &c. on paying the duties, in clearing the ſame at the cuſtom-houſe, and landing them, and delivering them to their reſpective owners, for certain reaſonable reward payable to the plaintiffs as ſuch brokers. That on the 25th of *October* 1803, divers ſhips had arrived in the docks from the *W. I.*, with baggage, &c. on board, the owners of which had employed the plaintiffs, as ſuch brokers, to clear, land, and deliver the ſaid baggage, &c. to them for a reaſonable reward; yet the *Company*, well knowing the premiſes, wrongfully and injuriouſly *cauſed to be taken and conveyed* into their warehouſes the ſaid baggage, &c. which the plaintiffs, as ſuch brokers, were legally authorized to do; and wrongfully and injuriouſly, *by their ſervants*,

The ſtat. 39 *G.* 3. *c.* 69. *ſ.* 184. directs that the *Weſt India Dock* Company ſhall ſue in the name of their treaſurer in all actions by or on behalf of the Company, and he ſhall be ſued for the recovery of any claim or demand upon or of any damages occaſioned by the Company; and *ſ.* 185 after extending the protection of the ſtat. 24 *Geo.* 2. *c.* 44. for privileging juſtices of peace in actions brought againſt them as ſuch, to the Lord Mayor and Aldermen of *London* acting under this act beyond the limits of the city; directs that "no action ſhall be commenced againſt *any perſon or perſons* for *any thing* done *in purſuance or under colour of this act*, until after 14 *days' notice* in writing, or after tender of amends, &c: held that the treaſurer of the Company is a perſon within the ſaid clauſe; and being ſued for an act done *by the Company* which induced an injury to the plaintiffs, was entitled to ſuch notice before the action brought. The notice is neceſſary in actions for treſpaſſes or torts; but *qu.* whether in aſſumpſit.

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vants, prevented the plaintiffs from entering into the ſaid warehouſes to clear away and deliver ſuch baggage, &c. to the reſpective owners, by reaſon of which they were prevented from doing the ſame, and were deprived of their profits as brokers, &c. to their damage, &c. There were various other counts, alleging in ſubſtance the ſame grievance. Plea not guilty. At the trial before Lord *Ellenborough* C. J., at the Sittings at *Guildhall*, it appeared in evidence that an order of the Court of Directors had been made on the 25th of *October* 1803, whereby, for the complete and expeditious delivery of baggage and preſents from on board ſhips in the docks, that Court had appointed a particular perſon to act as broker for the Company in the entering ſuch articles and paying the duties thereon, to the excluſion of other brokers. That under this order the plaintiffs, who had been appointed by certain conſignees as their brokers for this ſervice, had been precluded from performing it, and thereby were deprived of their brokerage. But no notice had been previouſly given to the defendant before the action brought. After a verdict for the plaintiffs a rule niſi was obtained for ſetting it aſide and having a new trial, on two grounds; 1ſt, on the general conſtruction of the ſtatutes relating to the *Weſt India Dock* Company, veſting large diſcretionary powers in the Company for regulating the concerns of the docks; 2dly, on the ground of want of 14 days' notice in writing to the defendant previous to the bringing this action.

The queſtion on the laſt point (the only one which was decided by the Court,) aroſe on the ſtat. 39 *Geo.* 3. *c.* 69. *ſ.* 184. and 185. Section 184. enacts, "that all "actions and ſuits commenced by or on behalf of the "Company ſhall be commenced and proſecuted in the

"name

" name of the treaſurer for the time being of the Com-
" pany, as the nominal plaintiff for and on behalf of the
" Company; and that all actions and ſuits to be com-
" menced by any perſon or perſons, &c. againſt the Com-
" pany, or for the recovery of any claim or demand upon
" or of any damages occaſioned by the ſaid Company,
" or for any other cauſe or cauſes of action or ſuit
" againſt the ſaid Company, ſhall be commenced and pro-
" ſecuted againſt the treaſurer for the time being of the
" ſaid Company, who ſhall be the nominal defendant,"
&c. Section 185. enacts, " that the ſtatute 24 *Geo.* 2.
" *c.* 44. *for rendering juſtices of peace more ſafe in the execu-*
" *tion of their office, and for indemnifying conſtables and others*
" *acting in obedience to their warrants*, ſo far as it relates
" to rendering juſtices of the peace more ſafe in the exe-
" cution of their office, ſhall extend to the mayor, alder-
" men, and juſtices reſpectively under the authority of
" this act. And no action or ſuit ſhall be commenced
" againſt *any* perſon or perſons *for any thing done in purſu-*
" *ance or under colour of this act*, until 14 days' notice
" ſhall be thereof given in writing, or after ſufficient
" ſatisfaction or tender thereof hath been made to
" the party or parties grieved, or after three calendar
" months next enſuing the time when the act or thing
" ſhall have been done, for which ſuch action, &c. ſhall
" be ſo brought, &c. And the defendant in ſuch actions,
" &c. may plead the general iſſue, and give this act and
" the ſpecial matter in evidence at the trial, &c., and that
" the matter or thing for which ſuch action, &c. ſhall be
" ſo brought was done in purſuance and by the authority
" of this act. And if the ſaid matter or thing ſhall ap-
" pear to have been ſo done; or if it ſhall appear that
" ſuch action, &c. was brought before 14 days' notice

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"given as aforeſaid, &c. the jury ſhall find for the de-"fendant," &c.

Garrow, *Park*, and *Wood* ſhewed cauſe againſt the rule, and contended that the 185th ſection only extended to acts originating in the function of magiſtracy, either done by juſtices of peace themſelves, or by perſons acting under their authority. The whole clauſe is to be conſtrued together. The firſt part of it extends to the city magiſtrates who may have certain duties to perform pointed out by antecedent clauſes in the act, and to theſe the protection of the general ſtatute of the 24 *Geo.* 2. *c.* 44. is extended; which protection was neceſſary to be given becauſe the ſtatute in queſtion enables them to act in certain caſes beyond the limits of their juriſdiction, where they would not have been within the prior law. Then the ſubſequent part of the clauſe naming *perſon or perſons* generally (which words alſo occur in the ſtat. 24 *Geo.* 2. *c.* 44. (*a*)) againſt whom actions may be commenced for things done *in purſuance or under colour of the act*, muſt be taken to mean conſtables and other ſpecial officers of the Company, ſuch as harbour-maſters and dock-maſters, by *ſ.* 78. and 80. who might be called upon to execute warrants and orders iſſued by the juſtices of the peace before mentioned: and it was neceſſary to make a particular proviſion for ſuch ſpecial officers, other than conſtables, who were not within the protection of the general law. If the Legiſlature had meant to include the directors and treaſurer of the Company, which latter was liable by the

(*a*) By ſtat. 24 *Geo.* 2. *c.* 44. *ſ.* 8. "no action ſhall be brought againſt "any conſtable, headborough, or other officer, or againſt *any perſon or perſons* "*acting by his order and in his aid*, for any thing done in obedience to any "*warrant*, &c. until demand made," &c.

ante-

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antecedent clauſe to be ſued for their acts, it is more natural to ſuppoſe that they would have expreſsly named them, and not have left their protection to be implied from any indefinite deſcription, which no where elſe occurs in the act. If the clauſe be not confined to acts of magiſtracy, many grievances and ſpoliations committed by the Company's ſervants on goods in their tranſit through the docks to the *Weſt Indies* muſt paſs without remedy; for they could not frequently be known till after three calendar months, when the limitation of time would run upon them, and no action could be brought againſt the Company or their ſervants. [Lord *Ellenborough* C. J. I do not ſee how acts of ſpoliation can be ſaid to be done "in purſuance or colour of the act."] Injuries may happen by the negligence of ſervants in the act of loading goods on board outward-bound ſhips, which might not be diſcovered till after their arrival in the *Weſt-Indies*, and before notice could be ſent home the time would be out for bringing an action. The mere naming of the treaſurer as defendant cannot bring the caſe within the 185th clauſe; for then no action even on a contract made with the Company, in which the treaſurer muſt be ſued, could be brought without giving the notice there required, and within three months, which would be ſo manifeſtly abſurd and unjuſt that the Legiſlature could not have intended ſuch a proviſion.

Erſkine, *Gibbs*, and *Giles* in ſupport of the rule. By making the treaſurer of the Company the nominal defendant in the action, the plaintiffs admit that the act of the directors, of which they complain, (and to which perſonally the defendant as treaſurer was no party) was an act done "*in purſuance*," or at leaſt "*under colour of the*

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act;" for otherwiſe there was no authority given to ſue the treaſurer for the acts of the Company; and therefore the 14 days' notice ought to have been given under the 185th ſection. It is enough that the act complained of was done "*under colour*" of the ſtatute; an expreſſion which is uſed disjunctively with things done "*in purſuance of*" it, and was meant to include ſuch acts as were not ſtrictly *juſtified* by the ſtatute; for there the defendant would not want *to tender amends*, which it was the object of the ſtatute in requiring the notice to be given to enable him to do. It meant to hold out this opportunity of protecting themſelves to the officers of the Company, who had bonâ fide meant to do the act complained of in their official characters under the powers of the ſtatute, however miſtaken they might turn out to be in their conſtruction of it; to correct an error which the magnitude and complexity of the truſt might ſubject them to. Here it was clear that the order of the directors, out of which the grievance complained of aroſe, was an act done in their official capacities; and the defendant being a *perſon* ſued for a thing done *in purſuance or under colour of the act*, was therefore entitled to the notice required by *ſ.* 185.: for *ſ.* 184. makes the Company a *perſon*, for the purpoſe of ſuing and being ſued, by ſubſtituting the treaſurer in lieu of the Company as the nominal party in all actions by or againſt it. The 185th ſection contains two diſtinct proviſions, which cannot be blended without manifeſt contradiction. By the firſt, the mayor, aldermen, and juſtices acting under that act are entitled to the protection of the ſtat. 24 *Geo.* 2. *c.* 44., which requires *one calendar month*'s notice to be given to a juſtice of peace before any action brought againſt him for any thing done ex officio. And then the clauſe goes on to enact, that no action ſhall be com-

commenced againſt *any perſon* for *any thing* done *in purſuance or under colour of the act* until *fourteen days'* notice, &c. and under the former ſtatute, the action may be brought within *ſix* calendar months after the act done; but in the latter ſtatute it is limited to *three*. But if this clauſe had been meant to be confined to conſtables and others acting under the immediate directions of the magiſtrates, it would not have limited different periods.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court.

On looking at the 184th and 185th ſections of the ſtat. 39 *Geo.* 3. *c.* 69. we think that notice ought to have been given to the treaſurer of the Company, againſt whom the action is brought, who, by *ſ.* 184. is ſubſtituted in the place of the Company, for the purpoſe of ſuing in all actions inſtituted by them, or of being ſued for the recovery of any claim or demand upon or of any damages occaſioned by the Company. The firſt part of the 185th ſection extends the proviſions of the ſtat. 24 *Geo.* 2. *c.* 44. to the lord mayor, aldermen, and juſtices acting under the authority of this act. It does not merely give them, what they had before, the benefit of the ſtat. of *Geo.* 2.; but as by the act in queſtion they had duties caſt upon them to perform out of the limits of the city of *London*, it muſt be underſtood as applying to thoſe caſes: and it is to be obſerved that that proviſion does not extend to conſtables. The clauſe then proceeds to regard another claſs of perſons. "*Any perſon or perſons*" are very general and indefinite words; and the queſtion is, Whether the Company are to have the benefit of them, ſued as they are and muſt be in the perſon of their treaſurer, and not

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not in their own names. Is the treaſurer a *perſon* within the meaning of the act? To ſay that he is not would be to narrow the act without any ſufficient reaſon. He is *ens legis* for the purpoſe of being ſued, &c. The clauſe does not ſay that "no action ſhall be commenced againſt any perſon or perſons for any thing done *by him or them* in purſuance or under colour of the act;" for then it might be ſaid that the grievance complained of was not done *by the defendant*, but by the Company. The queſtion then is, Was this a thing done by any perſon or perſons "*in purſuance or under colour of this act?*" The notice certainly applies to all actions of treſpaſs and tort. Whether it extend to aſſumpſit I ſhould doubt, according to the caſe of *Irving* v. *Wilſon* (*a*); where a revenue officer having ſeized goods as forfeited which were not liable to ſeizure, and having taken money of the owner to releaſe them, an action for money had and received was brought to recover it back again; to which objection was taken, that the officer had not had a month's notice before the bringing of the action under the ſtat. 23 *Geo.* 3. *c.* 70. *ſ.* 30. But the action was holden to be well brought notwithſtanding the want of ſuch notice. And my Brother *Groſe* conſidered that the ſtatute extended only to actions of treſpaſs or tort, becauſe the requiring of notice was to give the officer an opportunity of tendering amends; but that it did not extend to an action of aſſumpſit. There will be no repugnancy in the conſtruction which we now put upon the act. For, taking the former part of the 185th clauſe to extend only to the lord mayor, aldermen, and juſtices, they will have all the privileges given them by the former ſtatute. And *other perſons* men-

(*a*) 4 *Term Rep.* 485.

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tioned in the ſubſequent part will have their privileges under this act only. It has been argued that this conſtruction will deprive perſons of their remedy whoſe ground of complaint is not diſcovered ſo as to be communicated to them till after three calendar months, when it will be too late to give notice. That argument certainly prevails to a conſiderable extent; but if the legiſlature have not provided for that, we cannot make a law for them, nor control a proviſion which in itſelf is clear and plain, becauſe we cannot obviate all the difficulties which may ariſe out of it. If great inconvenience be likely to happen, that may form a ground of application elſewhere. Here the clauſe expreſsly directs "that no action ſhall be commenced againſt any perſon for any thing done in purſuance or under colour of this act, until 14 days' notice ſhall be thereof given." And the plaintiffs themſelves have, by their own action and declaration, ſo far put a conſtruction upon the thing done as having been done under colour of the act, that they have made *the treaſurer* defendant in a caſe, where the only grievance complained of is imputed to the *company*.

Rule abſolute (*a*).

(*a*) The defendant's counſel immediately agreed to wave their advantage, and refer the individual injury complained of to arbitration.

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POTTER and Another *againſt* BROWN.

Where the plaintiff gave the defendant, in a foreign country, where both were reſident, a bill of exchange drawn by the defendant *upon a perſon in* England, which bill was afterwards proteſted here for non-acceptance, and the defendant afterwards, while ſtill reſident abroad, became bankrupt there, and obtained a certificate of diſcharge by the law of that ſtate; held that ſuch certificate was a bar to an action here upon an implied aſſumpſit to pay the amount of the bill in conſequence of ſuch non-acceptance in *England*.

THE plaintiffs declared as payees of a bill of exchange drawn by the defendant at *Baltimore* in *America* on the 2d of *September* 1801, directed to *Anthony Mangin* of *London*, whereby the defendant requeſted *A. Mangin* ſixty days after ſight to pay to the plaintiffs or order 1200*l.* ſterling for value received, which bill was delivered by the defendant to the plaintiffs. The plaintiffs then averred that the bill was on the 23d of *December* 1801 preſented by them for acceptance to *A. Mangin*, who refuſed to accept the ſame; and thereupon they cauſed it to be proteſted for non-acceptance according to the cuſtom of merchants; by reaſon whereof the defendant became liable to pay the ſaid ſum upon requeſt, and being ſo liable he promiſed to pay it. The declaration alſo contained the common money counts: to which latter the defendant pleaded the general iſſue. And as to the firſt count he pleaded, that by a certain act of the Congreſs of the United States of *America* of the 2d of *December* 1799, intitled, *An act to eſtabliſh an uniform ſyſtem of bankruptcy throughout the United States*, it was enacted, that after the 1ſt of *June* 1800, if any merchant or other perſon reſiding within the U. S. actually uſing the trade of merchandiſe, &c. by buying and ſelling, &c. ſhould do certain acts, (enumerating them,) every ſuch perſon ſhould be deemed a bankrupt; provided the petition for the commiſſion of bankrupt ſhould be preferred within ſix months after the act of bankruptcy committed. And it was further enacted, that the judge of the diſtrict court where the debtor then reſided, or uſually reſided, at the time of

committing the act of bankruptcy, upon petition of any one or more creditors, &c. ſhould have power to appoint commiſſioners of the ſaid bankrupt, upon affidavit of the petitioning creditor's debt, and giving bond to the bankrupt conditioned to prove it, &c., which commiſſioners ſhould have power after they had declared the party a bankrupt, to take into their poſſeſſion all his eſtates real and perſonal, &c. in law or equity, &c. till aſſignees ſhould be appointed; and ſhould give due notice of the bankruptcy, and appoint a place for the creditors to meet and chuſe aſſignees; at which meeting the commiſſioners ſhould admit the creditors to prove their debts; and when any creditor ſhould reſide at a diſtance, ſhould allow the debt of ſuch creditor to be proved by oath or affirmation made before ſome competent authority and duly certified; and ſhould admit any perſon duly authoriſed by letter of attorney from ſuch creditor to vote in the choice of the aſſignees; and ſhould aſſign all the bankrupt's eſtate and effects, with all muniments, &c. to the aſſignees, &c. It then contained proviſions for the ſurrender and examination of the bankrupt, who was required to execute in due form ſuch aſſignment of his eſtate and effects as ſhould be directed by the commiſſioners, to veſt the ſame in the aſſignees, their heirs, executors, &c. in truſt for the uſe of all and every the creditors who ſhould prove their debts, &c. That in caſe any ſuch bankrupt ſhould afterwards be arreſted or impleaded for or on account of any of the ſaid debts, he might appear without bail, and plead the general iſſue, and give that act and the ſpecial matter in evidence: and the certificate of ſuch bankrupt conforming, and the allowance thereof according to the directions of that act, ſhould be allowed to be ſufficient evidence primâ facie of the party's being a bankrupt within

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within the meaning of that act, and of the commiſſion, &c., and a verdict ſhould thereupon paſs for the defendant, unleſs the plaintiff ſhould prove that the certificate was obtained unfairly and by fraud. It then ſet forth various regulations againſt fraud, and enacted that *every ſuch bankrupt ſhould be diſcharged from all debts by him due or owing at the time he became bankrupt, and all which were or might have been proved under the ſaid commiſſion.* And it was further enacted, that every perſon who ſhould have bonâ fide given credit to or taken ſecurities payable at future days from perſons who were or ſhould become bankrupts, not due at the time of ſuch perſons becoming bankrupts, ſhould be admitted to prove their debts and contracts as if they were payable preſently. The defendant then averred, that on the 22d of *February* 1802, while that act was in force, he was a merchant reſiding at *Baltimore* within the United States of *America*, and actually uſing there the trade of merchandiſe by buying and ſelling, and that he ſo reſiding and exerciſing trade, &c. became indebted to one *W. E.* in 1000 dollars, &c.; and that after the cauſe of action in the 1ſt count mentioned accrued to the plaintiffs (the ſaid debt to *W. E.* being then due), the defendant became a bankrupt within the meaning of the ſaid act. And ſo the plea proceeded to ſtate the iſſuing of the commiſſion of bankrupt againſt him on the petition of *W. E.*, in the manner preſcribed by the act; that the commiſſioners poſſeſſed themſelves of all the defendant's eſtate and effects, and iſſued the notice required to the bankrupt to ſurrender himſelf, and to the creditors to come in and prove their debts; that the defendant did ſurrender and conform himſelf to the act; that he was declared a bankrupt after the 1ſt of *June* 1800, and before the ſuing out of the commiſſion; that

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the creditors were by due notice required to prove their debts, and to aſſent or diſſent from his certificate; that his certificate was afterwards ſigned by full two-thirds of the creditors in number and value, for the purpoſe of his being diſcharged from his debts, in purſuance of the act; and that that certificate was duly allowed by the judge of the diſtrict. The defendant then averred, that after the making of the contract after mentioned, in purſuance of which the bill of exchange in the firſt count mentioned was drawn, and alſo before, at, and after the time of the defendant's drawing that bill and receiving the conſideration after mentioned for the ſame, the plaintiffs were merchants carrying on trade in copartnerſhip *as well in the United States of* America, to wit, at *Baltimore* aforeſaid as in *England*, and *having a houſe of trade in the U. S.*, to wit, at *Baltimore* aforeſaid, *where one of the plaintiffs* (W. Page) *then reſided*; and they ſo carrying on trade, and having a houſe of trade in the U. S., and one of them ſo reſiding there as aforeſaid, they, *before the defendant became a bankrupt*, viz. on 2d *September* 1801, *at* Baltimore *in the ſaid U. S. contracted with the defendant* to purchaſe of him ſuch bill of exchange as in that count is mentioned, and then and there delivered to him in payment, and as a conſideration for the ſame, divers promiſſory notes then and there in the ſaid U. S. made by one *R. D.*: and thereupon, before the defendant became a bankrupt, viz. on 2d *September* 1801, at *Baltimore* in the ſaid U. S., in purſuance of the laſt mentioned contract, and in conſideration of the aforeſaid promiſſory notes ſo to him delivered as aforeſaid, the defendant made and drew the ſaid bill of exchange in the firſt count mentioned, and delivered the ſame to the plaintiffs; and *that the ſaid debt by the firſt count attempted to be recovered did not, nor did any part thereof*

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accrue in this realm or elſewhere than in the ſaid U. S. in any other or different manner than this, that the ſaid bill of exchange being drawn in the U. S. as aforeſaid, *was drawn upon a perſon in this realm, and was preſented for acceptance in this realm, and was refuſed acceptance in this realm*, viz. at *London*, &c. And the defendant further averred, that the ſaid bill was preſented for and refuſed acceptance, as in the ſaid count mentioned, and the ſaid ſum in the ſaid bill mentioned became and was due and owing as aforeſaid before the date or ſuing forth of the commiſſion againſt the defendant, and before he became bankrupt as aforeſaid; and that after the ſame ſum ſo became due, and after the date and ſuing forth of the commiſſion, and while the ſame was in proſecution, and before the commencement of this action, viz. on 3d of *March* 1801, *at* Baltimore *in the ſaid U. S., the plaintiffs proved under the ſaid commiſſion as creditors of the defendant, taking the benefit of the ſaid commiſſion, the contents of the ſaid bill of exchange*, as a debt to them, and then due and owing from the defendant, they then and there being as ſuch creditors entitled to prove the ſame as aforeſaid, and to take the benefit of the ſaid commiſſion as aforeſaid, to wit, at, &c. concluding with a verification. To this there was a general demurrer, and joinder.

T. Carr in ſupport of the demurrer. A certificate obtained by a bankrupt abroad under a commiſſion iſſued by authority of the law of that country cannot be pleaded in bar to an action here for a cauſe of action ariſing in this country: for the law of a foreign ſtate cannot bind the ſubjects of this country, nor abrogate a contract ariſing here. If indeed the cauſe of action muſt be taken to have ariſen in *America*, where the defendant obtained his certifi-

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certificate, the caſe cannot be diſtinguiſhed from *Ballantine* v. *Golding* (*a*), the doctrine of which has been lately recognized in *Smith* v. *Buchanan* (*b*): but if it aroſe here the laſt mentioned caſe is an authority in point that the foreign certificate is no bar; and the ſame principle is eſtabliſhed by the caſe of *Folliott* v. *Ogden* (*c*). Now, 1ſt, The immediate cauſe of action aroſe in this country; for the cauſe of action is the aſſumpſit raiſed by law upon the legal liability of the defendant to pay the amount of the bill drawn by him, in conſequence of the diſhonour of the bill, which was in *England*. This is a right of action collateral to the bill itſelf, and did not exiſt in *America* before the non-acceptance of the bill, but aroſe on the diſhonour of the bill; for which the drawer is ſuable immediately, without waiting for the time the bill had to run. *Bright* v. *Purrier* (*d*), *Milford* v. *Mayor* (*e*), and *Ballingalls* v. *Gloſter* (*f*). 2dly, This, being a ſimple contract debt, follows the perſon of the creditor and not of the debtor. But, 3dly, Suppoſing the right of action to be founded on the bill, yet that being a negotiable inſtrument in its nature, and as it were a viſible choſe in action, and being addreſſed for acceptance to a perſon in *England*, it may be ſaid to have transferred the original debt in a peculiar manner from *America* to *England*, as if the contract had been originally made here: it was a contract by the drawer to pay the holder a ſum of money in this country. Then the promiſe and the breach of it may both be ſaid to have happened here, and out of the juriſdiction of the U. S. In *Burrows* v. *Jemino* (*g*) the acceptance (on which the plaintiff was ſued here) was at *Leghorn*, in which country

(*a*) *Co. Bankt. L.* 515. (*b*) 1 *Eaſt*, 6. (*c*) 1 *H. Blac.* 123.
(*d*) *London* Sittings after *Trin.* Term, 1765. *Bull. N. P.* 269.
(*e*) *Doug.* 54. (*f*) 3 *Eaſt*, 481. (*g*) 2 *Stra.* 733.

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he had obtained his discharge: and in *Ballantine* v. *Golding* (*a*) the bill was drawn in *Ireland*, and payable by the defendant who resided there, where the discharge was. But in *Robinson* v. *Bland* (*b*), where a bill of exchange was drawn by Sir *J. Bland* at *Paris* upon *himself in England* (which bill being drawn for money won at play was on that ground holden to be void); Lord *Mansfield* said, "the law of the place can never be the rule where the transaction is entered into with an express view to the law of another country. Here *the payment* is to be made *in* England; it is an *English security*, and so intended by the parties." And the other Judges spoke to the same effect. The same rule will apply to this case: the plaintiff looked to *English* security, and required his debt to be made payable here. (The Court having expressed a clear opinion against him on this point, the other points were not urged.)

Jervis contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. The rule was well laid down by Lord *Mansfield* in *Ballantine* v. *Golding*, that what is a discharge of a debt in the country where it was contracted, is a discharge of it every where. And that principle was recognized in *Hunter* v. *Potts* (*c*). Now this debt arose out of a contract in *America*. The debt was incurred there for which the bill was given. The bill was drawn in *America* upon a person in *England*: but not having been accepted, the parties stood on their original rights, upon a contract made in *America*, for which a security was *there* agreed to be taken, upon the faith indeed that it would be accepted and paid in *England*; but of which there has been no performance: no *English act* has been done to alter the

(*a*) *M* 24 *Geo.* 3. *B. R Co Lurkt. L.* 347. 1st edit.

(*b*) 2 *Burr.* 1077. (*c*) 4 *Term R. p.* 182.

situation

ſituation of the parties: even the notice of the non-performance, which is one of the circumſtances on which the implied aſſumpſit is founded, muſt have been given in *America*, where the parties are ſtated to have reſided when the bill was given, and when the bankruptcy happened, and nothing appearing to ſhew that they ever changed their reſidence. Then if the bankruptcy and certificate would have been a diſcharge of the debt in *America*, which it clearly would, it muſt, by the comity of the law of nations, recognized in the caſes I have mentioned, be the ſame here. It is in every day's experience to recognize the laws of foreign countries as binding on perſonal property; as in the ſale of ſhips condemned as prize by the ſentences of foreign Courts; the ſucceſſion to perſonal property by will or inteſtacy of the ſubjects of foreign countries. We always import together with their perſons the exiſting relations of foreigners as between themſelves, according to the laws of their reſpective countries; except indeed where thoſe laws claſh with the rights of our own ſubjects here, and one or other of the laws muſt neceſſarily give way, in which caſe our own is entitled to the preference. This having been long ſettled in principle, and laid up amongſt our acknowledged rules of juriſprudence, it is needleſs to diſcuſs it any further.

LAWRENCE J. The queſtion is, Whether the facts on which the plaintiff raiſes the implied promiſe did not occur in *America?* Now when the plaintiff agreed to take the bill in queſtion, drawn by the defendant in *America* upon a perſon in *England*, the promiſe was in effect this, to pay the money in *America* if it were not paid here. Then the bill having been refuſed acceptance here, the implied promiſe to pay the money aroſe in *America*, and conſe-

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conſequently the defendant's certificate is a bar to the demand.

The other Judges concurring,

Judgment for the Defendan.

Friday, May 4th.

DOE, on the Demiſe of JANE SHEWEN, Widow, *againſt* WROOT and Others.

Till admittance or the ſurrenderee of a copyhold upon mortgage the ſurrenderor continues the legal tenant, and he cannot deviſe the equity of re emption even after the ſurrender made without a new ſurrender to the uſe of his will; but the legal eſtate, which on his death deſcends to his heir at law, will carry the equity of redemption alſo to the heir in reſpect to the mortgagee.

IN ejectment for a moiety of ſeveral copyhold eſtates in *Sutton St. Mary*, *Sutton St. Nicholas*, and *Sutton St. James*, copyhold of the manor of *Sutton Holland*, and in *Gedney*, copyhold of the manor of *Gedney Pawlett*, all in the county of *Lincoln*, a verdict was found for the plaintiff at *Lincoln Lent* aſſizes 1803, before *Graham* B., ſubject to the opinion of this Court on the following caſe.

At a general court baron, holden for the manor of *Sutton Holland*, on the 22d of *May* 1766, *Anthony Jones* Eſq. was admitted as only brother and heir of *Richard Jones* Eſq. deceaſed, tenant to five meſſuages and 101 A. 3 R. 9 P. of land, lying in the three *Suttons*, holden of the ſaid manor by copy of court roll, to hold to the ſaid *A. Jones*, his heirs and aſſigns, for ever, according to the cuſtom of the ſaid manor. At a ſpecial court baron holden for the ſaid manor on the 10th of *February* 1767, *A. Jones* duly ſurrendered the ſaid meſſuages and lands to the uſe of *T. Alderſon* Eſq., his heirs and aſſigns, conditioned to be void on repayment of the principal mortgage ſum of 1000*l.*, with intereſt, on the 16th of *June* then next. Afterwards, at the ſame court, *A. Jones* ſurrendered the ſaid meſſuages, lands, &c. to the uſe of his will. *T. Alderſon* was never admitted on the above con-

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ditional ſurrender; but *A. Jones* continued in poſſeſſion of the ſaid eſtates and receipt of the rents and profits until his death, and died inteſtate, leaving *Jane Jones* his ſiſter and heir, who was, at a court holden for the manor on the 4th of *October* 1770, duly admitted to the ſaid eſtates, to hold to her and her heirs, &c. On the 2d of *October* 1770, *T. Alderſon* duly acknowledged ſatiſfaction on the above conditional ſurrender, which acknowledgment was enrolled at the ſaid court on the 23d of *May* 1771. On the 10th of *October* 1770, *Jane Jones* duly ſurrendered all her ſaid meſſuages, lands, &c. to the uſe of *J. F.*, *S. B.*, and *R. F.*, executors of *W. Langley*, and their heirs, &c. upon condition to be void on repayment to them of 4000*l.*, with intereſt, on the 10th of *April* following; which ſurrender was duly preſented on the 23d of *May* 1771; and at a court baron, holden on the 23d of *May* 1771, *Jane Jones* ſurrendered all her ſaid meſſuages, lands, &c. to the uſe of her will. *Langley*'s executors were never admitted on the above conditional ſurrender; but *Jane Jones* continued in poſſeſſion of the ſaid eſtates and receipt of the rents and profits until her death, and ſhe died inteſtate, leaving *Gryffyd Price* Eſq. her heir; who, at a court holden on the 31ſt of *May* 1787, was accordingly admitted tenant, to hold to him, his heirs, &c. *Gryffyd Price*, by a codicil to his will duly executed, and dated the 17th of *April* 1787, charged the above copyholds with an annuity of 200*l.* to his wife for life, and, ſubject thereto, he deviſed all the ſaid real eſtates ſo deſcended, and the truſt and equity of redemption of ſuch parts thereof as were then in mortgage, or wherein he ſtood ſeiſed of an equitable eſtate only, of what tenure or nature ſoever the ſame might conſiſt, unto his couſin *John Llewellyn* in fee: and afterwards died, leaving the

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ſaid *John Llewellyn* and *Jane Shewen*, the leſſor of the plaintiff, his couſins and heirs at law. At a manor court holden on the 27th of *June* 1788, *John Llewellyn* was admitted under the ſaid codicil of *Gryffyd Price* to the above meſſuages and lands, to hold to him, his heirs and aſſigns. At a manor court holden on the 19th of *May* 1796 was enrolled an acknowledgment of ſatisfaction, dated the 9th of *April* 1796, from *R. F.* the ſurviving executor of *W. Langley*, and from *W. Langley* his ſon and reſiduary legatee, on the above ſurrender, made the 10th of *October* 1770. In the 28th *Geo.* 3. an act paſſed for dividing and encloſing the commons of *Long Sutton*, compriſing the three *Suttons*; and the commiſſioners, by their award, dated 9th of *January* 1790, allotted to *John Llewellyn*, in reſpect to the above five copyhold meſſuages and in lieu of the rights of common, 78 A. 3 R. 19 P. of land in *Sutton St. Mary*. The act contains the uſual clauſe that the commiſſioners are not to determine on titles. At a general court baron, holden for the manor of *Gedney Pawlett*, on the 1ſt of *October* 1739, *Jane*, the wife of the Rev. *A. Jones*, clerk, was admitted as daughter and heir of *Jane Griffith*, widow, deceaſed, to 10 acres of land in *Gedney*, to hold to her, her heirs, &c. And at the ſame court was preſented a ſurrender made by *A. Jones* and *Jane* his wife, on the 27th of *July* then laſt, of the ſaid 10 acres in *Gedney*, to the uſe of them for their lives and the life of the ſurvivor; remainder to the heirs of their two bodies, remainder to the right heirs of *A. Jones*. And *A. Jones* and *Jane* his wife were thereupon admitted tenants on the above ſurrender to the ſaid land. On their deaths the land deſcended to *Richard Jones*, their eldeſt ſon; and on his death, without iſſue, to his only brother *Anthony Jones*; and on his death, without iſſue, to his only

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ſiſter *Jane Jones*; and on her death, without iſſue, to *Gryffyd Price* Eſq. her heir at law. But neither *Richard*, *Anthony*, or *Jane Jones*, or *Gryffyd Price*, were ever admitted thereto. By an indenture, dated 10th of *October* 1770, between the abovenamed *T. Alderſon* of the firſt part, the ſaid *Jane Jones* ſpinſter, of the ſecond part, and *J. F.*, *S. B.*, and *R. F.*, (executors of *W. Langley*) of the third part; reciting the mortgage for 1000*l.* from *A. Jones* to *T. Alderſon*, dated 15th and 16th of *January* 1767, of the freehold eſtates of *A. Jones* in *Sutton St. Mary*, *Sutton*, and *Gedney* aforeſaid, and which indenture of the 10th of *October* 1770 was an aſſignment and confirmation of the ſaid mortgage, and made for ſecuring 4000*l.* and intereſt to *J. F.*, *S. B.*, and *R. F.*, and wherein is a covenant from *Jane Jones*, that for the better ſecuring the payment of the ſaid 4000*l.* and intereſt, ſhe would immediately ſurrender all the copyhold premiſes before mentioned to the uſe of *J. F.* &c., their heirs and aſſigns, redeemable on repayment of the 4000*l.* and intereſt; but no ſurrender was made by *Jane Jones* in purſuance of this covenant. At a court holden for the manor of *Gedney Pawlett*, on the 31ſt of *March* 1796, *John Llewellyn* was admitted under the ſaid codicil of *Gryffyd Price* to the ſaid 10 acres of land in *Gedney*, to hold to him in fee: and on the 30th of *April* 1796, in conſideration, &c. he ſurrendered all the ſaid copyhold meſſuages and lands in *Long Sutton*, &c. as well the old eſtates as the new allotments, and alſo the ſaid land in *Gedney*, in different parcels, to the preſent defendants, who have been duly admitted thereto, and are now in poſſeſſion thereof. The queſtion for the opinion of the Court was, Whether the leſſor of the plaintiff were entitled to recover one moiety of the copyhold eſtates in *Long Sutton*, otherwiſe

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Sutton St. Mary, *Sutton St. Nicholas*, *Sutton St. James*, and *Gedney*, or either of them, as one of the heirs at law of *Gryffyd Price*, the ſame not having been ſurrendered by the ſaid *Gryffyd Price* to the uſe of his will? or, Whether the ſaid *Gryffyd Price*'s intereſt therein was not an equitable eſtate only, and as ſuch paſſed by his will without ſuch ſurrender?

Balguy, for the leſſor of the plaintiff, contended that *Gryffyd Price* had a legal and not an equitable eſtate only in the copyholds in queſtion; and he not having ſurrendered to the uſe of his will, the eſtates could not paſs to his deviſee. Where one is in legal ſeiſin as tenant of copyhold lands, and, by what is called a will, appoints thoſe lands to the uſe of another, he muſt ſurrender to the uſe of his will. In *Coke's Copyh. f.* 39. it is ſaid, "a ſurrender (where by a ſubſequent admittance the grant is to receive its perfection and confirmation) is rather a manifeſting of the grantor's intention than of paſſing away any intereſt in the poſſeſſion; for till admittance the lord taketh notice of the grantor as his tenant, and he ſhall receive the profits of the land to his own uſe, and ſhall diſcharge all ſervices due to the lord;" but "he cannot paſs away the land to any other, or ſubject it to any other incumbrance than it was ſubject to at the time of the ſurrender. Neither in the grantee is any manner of intereſt inveſted before admittance; for if he enter he is a treſpaſſer, &c. And if he ſurrender to the uſe of another, this ſurrender is merely void, and by no matter ex poſt facto can be confirmed." And he alſo referred to *Perry* v. *Whitehead* (*a*), *Kenebel* v. *Scrafton* (*b*), and to the follow-

(*a*) 6 *Veſ. jun.* 544. (*b*) 8 *Veſ. jun.* 30.

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ing MS. caſe: "*Floyd* v. *Aldridge and Willis*, 20th *Nov.* 1777. In 1772, the teſtator mortgaged the copyhold in fee, and ſurrendered to the mortgagee, but the latter was not admitted. The money was not paid at the time. The teſtator made his will in 1774, and deviſed the eſtate, without a ſurrender, to the uſe of his will; and died in 1775. The deviſee brought this bill to redeem, making the heir a party. Sir *T. Sewell*, Maſter of the Rolls, diſmiſſed the bill, ſaying, that the plaintiff had no intereſt in the copyhold in practice or otherwiſe. If the mortgagee have not the legal eſtate, there is no equity of redemption. The legal eſtate remains in the ſurrenderor till admittance of the ſurrenderee. After the firſt ſurrender, before admittance, he is tenant to the lord, and may therefore ſurrender to the uſe of his will. A ſecond cannot prejudice a firſt ſurrender. When the firſt ſurrenderee comes in he will be admitted. A mortgagee is ſeldom admitted: the mortgage is diſcharged by an entry on the court rolls. All remains in the mortgagor; no fine, no change of tenant, &c. As he might have made a ſurrender to the uſe of his will without prejudice to the mortgagee, he ought to have done it; and the eſtate cannot paſs at law; and equity will not aſſiſt a volunteer againſt the heir."

The Court aſked the defendant's counſel where the difficulty was? For till admittance the legal eſtate continues in the ſurrenderor, and deſcends to his heir, if it be not deviſed, and a ſurrender made to the uſe of the will.

Reader, contrà, admitted that till admittance of the ſurrenderee the legal eſtate remains in the ſurrenderor, ſo as to ſubject him to all the ſervices due to the lord: but he meant to have argued, that he had not any beneficial

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alienable eſtate in him after the ſurrender, and could not make any new diſpoſition of the land without ſatisfaction of the ſurrender being firſt entered on the court roll of the manor; and the admittance of the ſurrenderee at any time afterwards would certainly relate back to the time of the ſurrender. Therefore as to all but the lord the ſurrenderor ſeems to have only ſuch equitable right as he had reſerved to himſelf by the terms of the ſurrender; and therefore the equity of redemption might paſs by the will, without a ſurrender to the uſe of it; which ſurrender, pending the former unſatisfied ſurrender, ſeems to be uſeleſs. Or taking him to have the legal eſtate, yet holding it merely as a truſtee, it would deſcend to his heir as a bare truſt which could not be ſet up againſt the ceſtuy que truſt, who claimed under the will. He admitted, however, the application of the caſes of *Kenebel* v. *Scrafton*, and *Floyd* v. *Aldridge*, againſt his argument.

Lord ELLENBOROUGH C. J. We can only look to the legal eſtate, and that is clearly not in the deviſees, but in the heir at law of the ſurrenderor; and if the deviſees have an equitable intereſt, they muſt claim it elſewhere, and not in a court of law. For as to the doctrine that the legal eſtate cannot be ſet up at law by a truſtee againſt his ceſtuy que truſt, that has been long repudiated, ever ſince a caſe which was argued in the Exchequer Chamber ſome years ago (*a*).

Per Curiam, Poſtea to the Plaintiff (*b*).

(*a*) I preſume the caſe alluded to by his Lordſhip was *Weakley on the demiſe of Yea, Bart.* v. *Rogers*, where Sir *William Yea* had agreed about ſeven years before with the defendant to grant him, in conſideration of a certain ſum which was paid, a leaſe for his own and his ſon's life; and the defendant, on the faith of that agreement, had entered into poſſeſſion and built a houſe on the premiſes. After which Sir *Wm.* (not having executed any leaſe) gave the defendant

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defendant ſix months' notice to quit, conſidering him as tenant from year to year, and brought this ejectment. The caſe was argued in this Court in *Trinity* Term 29 *Geo.* 3., when the Court, after taking time to conſider, and (as it was underſtood) not being agreed in opinion, directed the caſe to be argued before all the Judges in the Exchequer-chamber, which argument took place in *Michaelmas* Term 30 *Geo.* 3., when a ſecond argument was awarded; but the caſe was never brought before the Judges again. [Vide 7 *Term Rep.* 51.] But, as I collected at the time, Lord *Loughborough* C. J. *Gould*, *Aſhhurſt*, and *Buller* Js., were of opinion that the defendant's equitable title might be ſet up as a defence to the ejectment. Lord *Kenyon* C. J. *Eyre* C. B. and *Heath* J. were decidedly of a different opinion: and with theſe it is probable that the other Judges coincided; though I have no authority for ſaying ſo; and no public opinion was ultimately delivered on the caſe. But that an equitable title cannot be ſet up in ejectment has ever ſince been conſidered as ſettled. Vide *Doe* v. *Sybourn*, 7 *Term Rep.* 2., *Goodtitle* v. *Jones*, in Error, *ib.* 47., *Doe* v. *Wharton*, 8 *Term Rep* 2., and *Roe* v *Reade*, *ib.* 122, 3. See alſo, on the ſame ſubject, *Doe* v. *Pegge*, 1 *Term Rep.* 758., *Doe* v. *Staple*, 2 *Term Rep.* 684, and *Roe* v. *Lowe*, 1 *H. Blac.* 446.

(*b*) But where the mortgagee is admitted, the equity of redemption may be deviſed by the mortgagor, without having ſurrendered to the uſe of his Will. *King* v. *King*, 3 *P. Wms.* 358.

BONNER *againſt* CHARLTON.

Friday, *May* 4th.

IN aſſumpſit, the declaration ſtated, that on the 14th of *Auguſt* 1782 certain differences were depending between the plaintiff and defendant, and that at the aſſizes at *Newcaſtle* a cauſe between them was to have been then tried, but by an order of Niſi Prius it was ordered by the conſent of the parties that there ſhould be a verdict for the plaintiff for 30*l.* damages and 40*s.* coſts, ſubject to the award of *J. A.*, *J. H.*, and *W. T.*, to whom all matters in difference between the parties were referred, ſo that they ſhould make their award in writing on or before the 10th of *November* then next, and that the coſts of the cauſe ſhould abide the event of the award, &c., and that

Where a verdict is taken for a certain ſum, ſubject to the award of an arbitrator, to whom all matters in difference are referred by a rule of Niſi Prius, he cannot award a *greater* ſum than that for which the verdict was taken, and if he do, no aſſumpſit by implication will ariſe to pay even to the extent of the verdict ſo taken.

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that that order ſhould be made a rule of Court. It then ſtated the mutual promiſes to perform the award, and then averred an award made by the arbitrators named on the 6th of *November*, adjudging that there was due from the defendant to the plaintiff 70*l.* which they directed to be paid on the 1ſt of *January* 1803, and that the coſts of the arbitration ſhould be equally borne, and that the defendant ſhould pay to the plaintiff the further ſum of 5*l.* 5*s.* a moiety of ſuch coſts, and that the plaintiff ſhould thereupon diſcharge the coſts of the arbitration: of which the defendant had notice. That the order of Niſi Prius was afterwards made a rule of Court, and the coſts were taxed at 73*l.* *By reaſon of all which premiſes* the defendant became liable to pay to the plaintiff the ſaid ſums of 70*l.* and 73*l.*, *according to the form and effect of the award, and the ſubmiſſion, promiſe, and undertaking of the defendant;* and then ſtated the breach in nonpayment of thoſe ſums. There were alſo the common counts for money paid, &c. The defendant paid into court the 5*l.* 5*s.*, the moiety of the coſts of the award, and to the reſt pleaded non aſſumpſit. And at the trial at the laſt ſummer aſſizes at *Newcaſtle*, before *Thomſon* B., a verdict was found for the plaintiff for 143*l.*, made up of the ſum of 70*l.* awarded to be paid, and the ſum of 73*l.*, the taxed coſts mentioned in the pleadings of this cauſe, ſubject to the opinion of the Court on the following caſe.

The order of Niſi Prius mentioned in the pleadings was as follows: "it is ordered by the conſent of the ſaid "parties and their attornies, that there be a verdict in this "cauſe for the plaintiff 30*l.* damages, and 40*s.* coſts, ſub-"ject to the award and determination of *J. A.*, *J. H.*, "and *W. T.*, to whom all matters in difference between "the parties are referred, ſo that they or any two of them "make

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" make and publiſh their award in writing on or before " the 10th of *November* next, and that the coſts of the " cauſe ſhall abide the event of the award, and the coſts " of the arbitration be in the diſcretion of the arbitrators, " who may direct by, and to whom, and in what manner " the ſame ſhall be paid; and that a verdict ſhall be en- " tered for ſuch ſum only (if any thing) as the ſaid arbi- " trators, or any two of them, ſhall find to be due from " the defendant to the plaintiff." And if nothing be due, then that a verdict ſhould be entered for the defendant, &c. Proceeding in the common form, and concluding that the order ſhould be made a rule of Court, &c. The arbitrators afterwards made their award on on the 6th of *November* 1802, within the time limited; in which, after reciting the order of Niſi Prius, and conſidering the proofs, they adjudged that there was due from the defendant to the plaintiff 70*l.*, and awarded the defendant to pay the ſame to the plaintiff on the 1ſt of *January* then next, &c. at a certain place named; and further that the coſts of the arbitration ſhould be borne by the parties equally, and that the defendant ſhould pay the plaintiff the further ſum of 5*l.* 5*s.*, being a moiety of ſuch coſts, and thereupon the plaintiff ſhould pay all the coſts of the arbitration; and that on payment of that ſum, together with the ſaid ſum of 70*l.* and the coſts, the parties ſhould execute mutual releaſes. The coſts of the cauſe were afterwards taxed by the Maſter of this court in the ſum of 73*l.* The defendant, on the 6th of *November*, had notice of the award, and the plaintiff attended at the time and place appointed for the purpoſe of receiving the damages and coſts awarded to him; but the defendant never paid or tendered the damages or coſts, except the ſaid ſum of 5*l.* 5*s.* paid into court as aforeſaid. The

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plaintiff's counſel inſiſted at the trial that the ſaid payment into court by the defendant of the five guineas admitted the order of Niſi Prius and award to be the ſame as ſet forth in the declaration. On the 12th of *February* 1803 payment of the ſums of 70*l.* and 73*l.*, mentioned in the award and the Maſter's allocatur, was demanded of the defendant, which he did not pay; and the plaintiff diſcharged the whole coſts of the arbitration, being ten guineas. There was no proof of any promiſe otherwiſe than as aforeſaid. The queſtion for the opinion of the Court was, Whether the plaintiff were entitled to recover any and what ſum?

Richardſon was to have argued for the plaintiff, and *T. Carr* for the defendant. But on the opening of the caſe,

The Court expreſſed a decided opinion that the arbritrator had no authority to award greater damages than what the verdict of the jury had been taken for at the trial. The only power given to an arbitrator in ſuch caſe being to reduce, but not to enhance the damages. And in anſwer to an obſervation by the plaintiff's counſel, that at leaſt the plaintiff might take his judgment for the 30*l.* given by the jury, inaſmuch as the award was good up to that extent, though bad for the exceſs; *the Court* ſaid that could not be done in a caſe where the award was of of an entire ſum, though it might when diſtinct things were awarded, ſome of which were good and others not. That if damages were laid in the declaration at 100*l.*, and the jury gave 200*l.*, it would be error on the record, and a court of error could not cut down the verdict to 100*l.*

The hardſhip of the caſe being further preſſed, the Judges gave their opinions ſeriatim.

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Lord ELLENBOROUGH C. J. The verdict was taken at the trial for 30*l.*, subject to the award of an arbitrator: he had therefore a limited jurisdiction, *within that amount*, to assess the damages which, upon investigation, he should find that the plaintiff had sustained; but he had no authority to *exceed* that amount. The damages found by the jury may in this respect be compared to the damages laid in the declaration; they operated as a limit to the discretion of the arbitrator, in like manner as the jury are limited by those laid in the declaration. If the jury find more than are laid, and the plaintiff do not remit the excess upon the record, the Court have no authority to do so, and the verdict will be erroneous. Here we have nothing to guide our discretion in cutting down the sum awarded. If we could ask the arbitrator whether the sum of 30*l.* were right, he might very consistently answer in the negative, and tell us that either the 70*l.* was in fact due, or none, or less than 30*l.* That would depend on his judgment on the several items of the account. Therefore all that we can see is, that the arbitrator has formed a wrong judgment: we have no means of correcting it: we may quash his award altogether, but we cannot mend it. If instead of bringing on the question in this shape the facts had been laid before the Court by affidavit in a summary way, we might have formed our judgment upon the matter and aided the plaintiff as far we were warranted in doing: but I understand an attempt of this sort has already been made without success.

GROSE J. I remember the application made some terms ago in this matter. The object there was to enter judgment for the 70*l.*, which we thought we had no authority

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to direct when the jury had only given 30*l.* The plaintiff then was not satisfied with 30*l.*

LAWRENCE J. If the arbitrator had awarded two distinct sums of 30*l.*, we might have allowed the plaintiff to take judgment for the one sum which was legal, and not for the other which exceeded his authority. But we cannot tell whether the arbitrator did not take into his consideration matters which were not submitted to him; and that if he had not so done, whether he would not have reduced the damages even below 30*l.* How then can we say that the plaintiff should have judgment for 30*l.* without knowing on what ground the excess was given? What the Court refused on the former application was to give the plaintiff the whole sum awarded. If it had been shewn that the arbitrator at all events thought the plaintiff entitled to the 30*l.* we might have granted the application to that extent.

LE BLANC J. This action is founded upon an implied assumpsit for 70*l.* and the costs. Now I cannot think that under the rule of reference, the verdict having been taken for 30*l.* only, that the law will raise an implied assumpsit to pay as much more as the arbitrator shall think proper to award. The true meaning of the rule of reference is, that the parties consent that the arbitrator shall mould *the verdict* which has been taken, and that the verdict so moulded by him shall be taken to be the verdict which the jury should have found. For this purpose the verdict is always taken at the highest sum for which it is supposed that the damages can in any event be awarded, generally indeed for the amount of the damages

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mages laid in the declaration; but it never is underſtood by the parties to ſuch conſent rule that the arbitrator is at liberty to award damages to any extent he pleaſes. The law therefore will not raiſe an aſſumpſit to pay any larger ſum than what the arbitrator had authority to award; and he having awarded one entire ſum, beyond his authority, no aſſumpſit can be raiſed to pay that or any ſmaller ſum.

Lord ELLENBOROUGH C. J. declared his further concurrence on the laſt mentioned ground.

Poſtea to the Defendant.

SOMERVILLE *againſt* WHITE.

Monday, May 7th.

A Rule niſi was obtained for ſetting aſide the execution, and returning the money which had been levied under it, for irregularity; the execution having been ſued out pending a writ of error and after notice of the allowance. After a ſham plea and iſſue joined, and interlocutory judgment and a writ of inquiry executed, the defendant, four days before final judgment entered up, ſued out a writ of error on the 9th of *February*, returnable on the 11th, and ſerved notice of the allowance: the plaintiff, notwithſtanding, after entering up final judgment on the 15th, ſued out execution thereon.

Garrow ſhewed cauſe, inſiſting that it appeared upon the very face of the proceedings that the writ of error was ſued merely for delay; it having iſſued four days before final judgment entered. That this was a more convincing proof of it than an unguarded acknowledgment of the party himſelf in converſation, which was admit-

The Court will not infer that a writ of error was ſued out for delay becauſe it was ſued out before final judgment ſigned: and though it ſhould be made returnable before final judgment, it will ſtill operate as a ſuperſedeas upon the judgment, which, when ſigned in the ſame term, relates back to the firſt day of it: and therefore execution iſſued thereon after ſuch writ of error allowed and ſerved was ſet aſide for irregularity.

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ted to be a ſufficient reaſon for ſuing out execution pending a writ of error.

Gibbs and *Comyn*, contrà, cited *Jaques* v. *Nixon* (*a*), where final judgment was not ſigned till after the writ of error ſued out and the allowance of it ſerved; and there *Buller* J. recognized the practice of ſuing out a writ of error before judgment ſigned; which he ſaid happened in almoſt all caſes; for otherwiſe execution would iſſue inſtantly. And that if a writ of error be ſued out, and the plaintiff will not ſign judgment till after the return of the writ, in order to avoid the effect of it, and then ſue out execution, the Court would ſet that execution aſide: and ſo it was done in that caſe.

The Court referred to *Warwick* v. *Figg* (*b*), where, under ſimilar circumſtances, it was contended that the writ of error, which was returnable before final judgment, was ſpent when the judgment was entered up and execution iſſued, and therefore was no ſuperſedeas to the execution. But it was ruled otherwiſe; becauſe the judgment, when entered, related back to the firſt day of the term, and therefore the writ of error was a ſuperſedeas to it: and the Court therefore ſet aſide the execution. And they added that they could not infer that any delay was intended merely from a view of the proceedings, without an acknowledgment by the party that the writ of error was ſued out merely for delay. That the precaution of ſuing out the writ of error before final judgment ſigned was ſometimes neceſſary: For where the judgment was for a large ſum, a plaintiff would ſometimes ſue out execution immediately afterwards without waiting to have his coſts taxed,

(*a*) 1 *Term Rep.* 279. (*b*) Qto. *Barnes*, 196.

and

and before a writ of error could be ſued out to ſtay him, if it were not ſued out before.

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SOMERVILLE *againſt* WHITE.

Rule abſolute.

NADIN *againſt* BATTIE and WARDLE.

Monday, May 7th.

THE defendants were arreſted on a joint ca. ſa.; after which *Wardle* was diſcharged under an inſolvent debtors' act, the plaintiff not oppoſing ſuch diſcharge. Whereupon

If one of two defendants taken on a joint ca. ſa. be diſcharged under an inſolvent debtors' act, that will not operate as a diſcharge of the other, the diſcharge of the former not being with the actual conſent of the plaintiff.

Littledale now moved to diſcharge the other defendant *Battie*, and cited *Clark* v. *Clement* and *Engliſh* (*a*), and other caſes there referred to, to ſhew that if a plaintiff conſent to diſcharge one of ſeveral defendants taken on a joint ca. ſa., he cannot afterwards take any of the others. And though, he obſerved, the diſcharge in this caſe might be ſaid to be by the act of the law, and not, as in that caſe, by the plaintiff's own act; yet the plaintiff ſo far adopted it, that if he had choſen to pay the ſixpences he might have prevented the diſcharge.

Lord ELLENBOROUGH C. J. The diſcharge cannot be ſaid to have been with the plaintiff's aſſent, becauſe he did not chooſe to detain the party in priſon at his own expence. Nor can the law, which works detriment to no man, in conſequence of having directed the diſcharge of one defendant, ſo far implicate the plaintiff's conſent, againſt the fact, as to operate as a diſcharge of the other.

Per Curiam, Rule refuſed.

(*a*) 6 *Term Rep.* 525.

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Tuesday, May 8th.

APPLETON *against* BINKS.

One who covenants *for himself, his heirs*, &c. and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf* of such other person.

THE plaintiff declared in covenant upon articles of agreement between him on the one part, and the defendant *by the name and description of* T. Binks, *of*, &c. (*for and on the part and behalf of the Right Hon. Lord Viscount* Rokeby) of the other part, with a profert in curiam of the articles sealed *with the seal of the defendant*; whereby the plaintiff, in consideration of 6000*l. paid by Lord* Rokeby, covenanted *with the defendant, his heirs and assigns*, that he (the plaintiff), his heirs, &c. would, at the cost of Lord *Rokeby*, his heirs, &c. on or before the 13th of *May* 1803, by such conveyances as Lord *R.* should require, convey to Lord *R.*, &c. in fee, certain premises in the county of *York*, &c., with such warranty, &c. as Lord *Rokeby* should require, &c. *In consideration whereof*, the defendant *for himself, his heirs, executors*, &c. *on the part and behalf of the said Lord Viscount* Rokeby, did thereby covenant with the plaintiff *that Lord V.* Rokeby, *his heirs*, &c. should pay to the plaintiff the said 6000*l.* the purchase-money at the time of sealing and executing of the conveyances aforesaid; with a proviso that if Lord *Rokeby*'s counsel should not approve of the plaintiff's title to the premises, or if Lord *R.* should die before the said 13th of *May* next, the agreement should be void. The plaintiff then averred his seisin in fee of the premises, and that his title was approved by Lord *Rokeby*'s counsel, and that Lord *R.* was still living; and that though the plaintiff was willing to execute proper conveyances to Lord *R.*, his heirs, &c. at their costs, &c. *of all which premises Lord* R., after the making of the said articles, *had notice*; and although the plaintiff, after making the articles,

and

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and before the 13th of *May* next enſuing, &c. gave notice *to Lord* Rokeby *and the defendant* that the plaintiff and his wife were ready and willing to convey *to Lord* R., *his heirs*, &c. yet Lord *Rokeby* has not paid to the plaintiff the ſaid 6000*l.* the purchaſe-money, but has refuſed, &c.; nor did Lord *R.* require any conveyance, &c., but declined ſo to do: contrary to the effect of the articles and the covenant of the defendant; &c. whereby the defendant has broken his covenant, &c. to the damage of the plaintiff, &c. To this there was a general demurrer and joinder.

W. Jackſon, in ſupport of the demurrer, propoſed to argue, 1ſt, that a deed could not be made by an *agent*, *as ſuch*; or, 2dly, that if it could, covenant did not lie againſt him, upon articles deſcribing him to be merely *agent* for another. But

The Court ſaid that it was impoſſible to contend that where one covenants for another he is not to be bound by it; the covenant being in *his own* name "*for himſelf, his heirs*," &c. There was nothing unuſual or inconſiſtent in the nature of the thing, that one ſhould covenant to another that a third perſon ſhould do a certain thing, as that he ſhould go to *Rome*. The party to whom the covenant is made may prefer the ſecurity of the covenantor to that of his principal. Here the defendant covenants *for himſelf*, not in the name of his principal, and puts his own ſeal to it. There is nothing againſt law in it, if he will bind himſelf for his principal. He probably conſented to it upon an indemnity.

Judgment for the Plaintiff (*a*).

Hullock was to have argued for the plaintiff.

(*a*) Vide *Frontin* v. *Small*, 1 *Stra.* 705. 2 *Ld. Ray.* 1418. *Macbeath* v. *Haldimand*, 1 *Term Rep.* 172.; and *Unwin* v *Wolſeley*, *ib.* 674. Vide alſo *White* v. *Cuyler*, 6 *Term Rep.* 176., and *Wilkes* v. *Back*, 2 *Eaſt*, 142.

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Tueſday, May 8th.

HENSHALL *againſt* ROBERTS and Others, in Error.

A count upon an account ſtated with the plaintiff's *executrix*, &c. (not ſaying *as* executrix, &c.) cannot be joined with counts on promiſes to the teſtator; for it is no allegation that the promiſes were made to the plaintiffs in their repreſentative capacity; and under ſuch a count proof might be given of an account ſtated with them in their individual characters. *Qu.* Whether if it had been laid to be on *an account ſtated* with the plaintiffs themſelves, though named *as executrix*, &c. it could be ſo joined, as the cauſe of action would ſtill appear to have ariſen in the time of the executrix, &c., though the money, when recovered, would be aſſets?

S. Henſhall was attached to anſwer *Sarah Roberts* and others, executrix and executors of the laſt will and teſtament of *William Roberts* deceaſed, which *W. R.* was executor, &c. of *W. Danſon*, of a plea of treſpaſs on the caſe, &c. For that whereas the defendant *Henſhall* in the lifetime of *Danſon* was indebted to *Danſon* in 500*l.* for goods ſold and delivered by *Danſon* in his lifetime to the defendant *Henſhall* at his requeſt, he the defendant, in conſideration thereof, promiſed *Danſon* in his lifetime to pay him, &c. There were various other counts upon promiſes made by the defendant to *Danſon* in his lifetime. Another ſet of counts was upon promiſes to the plaintiffs below, the executors of the executor, the firſt of which ſtated that whereas the defendant *Henſhall* afterwards and in the lifetime of *Danſon* and of *W. Roberts* reſpectively was indebted to *Danſon* in other 500*l.* for goods ſold and delivered by *Danſon* in his lifetime to the defendant at his requeſt, and being ſo indebted, the defendant in conſideration thereof afterwards, and after the deceaſe of *Danſon* and *Wm. Roberts* reſpectively promiſed the ſaid *Sarah*, &c. (the plaintiffs below) *executrix and executors as aforeſaid* to pay to them the ſaid ſum when requeſted. The declaration alſo contained the two following counts: "and whereas the defendant *Henſhall* afterwards, &c. *accounted with the ſaid* Sarah, &c. (the plaintiffs below) *executrix and executors as aforeſaid* concerning divers other ſums to the ſaid *Sarah*, &c. (plaintiffs below) *executrix and executors* as aforeſaid, from the defendant before that time due and owing, and then in arrear and unpaid; and upon that account the defendant was found in arrear and indebted *to the ſaid* Sarah, &c. *executrix and executors* as aforeſaid in the further ſum, &c.

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the defendant afterwards, &c. promiſed the ſaid *Sarah*, &c. *executrix and executors as aforeſaid*, to pay them, &c. when requeſted. And whereas the defendant *Henſhall* was indebted to the ſaid *Sarah*, &c. *executrix and executors as aforeſaid*, in the further ſum of 500*l.* for certain *intereſt* before that time due and owing from the defendant to the ſaid *Sarah*, &c. *executrix and executors as aforeſaid for and on account of the ſaid* Sarah, *&c. executrix and executors as aforeſaid*, at the inſtance of the defendant, *having forborne and given day of payment* to the defendant of divers ſums due and owing *to the ſaid* W. Danſon *in his lifetime*, and at the time of his death by the defendant then due and owing to them the ſaid *Sarah*, &c. *executrix and executors as aforeſaid*, the defendant, in conſideration thereof promiſed the ſaid *Sarah*, &c. *executrix and executors* as aforeſaid to pay them, &c.: yet the defendant not regarding his ſaid ſeveral promiſes, &c. but intending to defraud the ſaid *W. Danſon* in his lifetime, and the ſaid *Wm. Roberts* after the death of *Danſon* in his lifetime, who ſurvived *Danſon* and was *Danſon*'s executor, and alſo the ſaid *Sarah*, &c. executrix and executors as aforeſaid ſince the deceaſe of *Danſon* and of *W. Roberts*, hath not paid, &c., and therefore the ſaid *Sarah*, &c. bring their ſuit, &c., and the ſaid *Sarah*, &c., bring into court here the letters teſtamentary of *Danſon*, whereby it appears that *Wm. Roberts* was the executor of *Danſon*, &c., and alſo the letters teſtamentary of *Wm. Roberts*, whereby it appears that the ſaid *Sarah*, &c. are executrix and executors of *Wm. Roberts*, &c.

After judgment by nil dicit and a writ of inquiry to aſſeſs damages, and final judgment in the court of Common Pleas in *Trinity* term laſt, a writ of error was brought in this court; and amongſt other common errors it was aſſigned for error, that in ſome of the counts the plaintiffs

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have declared upon promiſes made to *W. Danſon* deceaſed, in his lifetime, and upon certain other promiſes made to the plaintiffs *as executrix and executors* as aforeſaid, and alſo upon promiſes made to the plaintiffs upon a cauſe of action accruing to them *in their own right*, viz. for intereſt due from the defendant to the plaintiffs for and on account of the plaintiffs having forborne and given day of payment to the defendant for divers ſums, &c. Joinder in error.

Jervis, for the plaintiff in error, inſiſted on the miſjoinder of the count upon *the account ſtated* with the plaintiffs below in their own right, in the ſame declaration with counts upon promiſes to their teſtator, which could only be recovered in their repreſentative character; becauſe the ſame judgment could not be given on the two different deſcriptions of counts. *Jennings* v. *Newman* (*a*), and *Rogers* v. *Cook* (*b*). And where the action is upon promiſes made to the executors upon a cauſe of action ariſing in their time, they are liable to coſts if they fail; and the naming themſelves *executors* is not material. *Nicholas* v. *Killegrew* (*c*), and *Wallis* v. *Lewis* (*d*). The very form of the count upon an account ſtated with the executors ſeems to imply a cauſe of action in their own time; though it has been uſual to add ſuch a count in actions by or againſt executors; and in *Secar* v. *Atkinſon* (*e*) it was holden to be no misjoinder with counts on promiſes made by the inteſtate. But there the plaintiff declared that he had accounted with the defendant *as adminiſtratrix*, and here the account is only alleged to have been ſtated with the plaintiffs below, "*executrix and executors*," not ſaying "*as* executrix," &c.; which is no allegation that the debt aroſe to them in their repreſentative character.

(*a*) 4 *Term Rep.* 347. (*b*) 1 *Salk* 10. (*c*) 1 *Ld. Ray.* 436.
(*d*) *Ib.* 1215. (*e*) 1 *H. Blac.* 102.

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character. *Brigden* v. *Parkes* (*a*). But at any rate the laſt count for *intereſt* on a forbearance by the plaintiffs below muſt be founded on a cauſe of action ariſing in their own time, which therefore clearly cannot be joinder with the other counts. It is not ſufficient that the principal was due to the teſtator in his lifetime; for if a new ſecurity be taken by the executor, as a promiſſory note, he cannot declare on that jointly with other promiſes to the teſtator. *Betts* v. *Mitchell* (*b*). A fortiori then he cannot recover intereſt accruing in his own time with any other count on promiſes to him merely as executor. It is true, that *Buller* J. in *King* v. *Thorn* (*c*), and in *Cockerill* v. *Kynaſton* (*d*), ſays, that the only queſtion in ſuch caſes is, whether the ſum when recovered will be aſſets of the teſtator; but that rule was doubted in *Bollard* v. *Spencer* (*e*); and though adverted to again in *Ord* v. *Fenwick* (*f*), yet there the promiſe was laid to be made to the plaintiff "*as executrix*."

Boſanquet contrà, obſerved, that by neceſſary implication where the parties to whom the promiſe was alleged to be made named themſelves "executrix and executors," it muſt be taken to have been made to them in their repreſentative capacity, and meant the ſame as if it had been ſaid "*as* executrix," &c.; more eſpecially when it is ſaid, "executrix, &c. *as aforeſaid*," which refers to the antecedent counts, in which it is admitted that they ſued in their repreſentative characters. [Lord *Ellenborough* C. J. We cannot import any thing from the other counts; we muſt look to this upon the account ſtated, and ſee whether it

(*a*) 2 *Boſ. & Pull.* 424.
(*b*) 1 *Mod.* 316.
(*c*) 1 *Term Rep.* 489.
(*d*) 4 *Term Rep.* 281.
(*e*) 7 *Term Rep.* 358.
(*f*) 3 *Eaſt*, 110.

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can be joined with the reſt.] In the very beginning of the declaration it is ſtated, that the defendant was attached to anſwer the plaintiffs, *executrix and executors*, &c.; and in the concluſion they make a profert of the letters teſtamentary, which ſhews that they ſued as ſuch.

Lord ELLENBOROUGH C. J. That leaves the queſtion as before. It is the ſame as if it were ſaid, "*A.*, *B.*, &c. being executor," &c. it is not an allegation of their ſuing *as ſuch*; and we can ſupply nothing by intendment. If it had been alleged that they ſued *as executrix*, &c. that would have been enough to have raiſed the other queſtion, Whether a count upon promiſes on *an account ſtated* with one as executor can be joined with other counts on promiſes with the teſtator? upon which there are authorities both ways. The caſes in favour of the propoſition are *Bull* v. *Palmer* (*a*), and *Maſon* v. *Jackſon* (*b*), together with the opinion of Mr. Juſtice *Buller* in the caſes cited, that wherever the ſum recovered by the executor on promiſes to himſelf would be aſſets in his hands, there the count may be joined with counts on promiſes made to the teſtator. But there are many authorities the other way, and I think you will hardly find the point tenable. However, if you wiſh to have time to look into the firſt point, to ſee if the queſtion can be raiſed on this record, the Court will give you leave to mention it again, if you think it will admit of argument. At preſent,

Per Curiam, Judgment niſi, &c. for the Plaintiff in Error.

And *Boſanquet*, a few days afterwards, ſaid that he could not get rid of the preliminary objection,

(*a*) 2 *Lev.* 165. (*b*) 3 *Lev.* 60.

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THIS was an action againſt an underwriter upon a policy of inſurance effected by the Plaintiff as agent, reſiding in *Great Britain*, upon the ſhip *Oxholme* and her cargo, both *warranted Daniſh*, at and from the iſland of *Saint Thomas* to the coaſt of *Africa*, during her ſtay and trade there, and at and from thence to *Surinam*, with leave to call at *Bermuda* outward bound, with leave to exchange goods and ſlaves with any veſſels. The Plaintiff in his declaration averred the intereſt in ſhip and cargo to be in *James Hazzell*, *James Murphy*, and *R. D. Jennings*, who during the time of the inſurance and loſs, were and ſtill are *Daniſh* ſubjects, and that the ſhip and cargo were *Daniſh*; and that during the voyage inſured, the ſhip and cargo were hoſtilely ſeized, taken, and carried away upon the high ſeas by perſons unknown. Plea the general iſſue. At the trial at *Guildhall* a ſpecial verdict was found, in ſubſtance as follows:

The plaintiff was the agent reſiding in *Great Britain*, and on account of *J. Hazzell*, *J. Murphy* and *Jennings*, cauſed to be made the policy in queſtion, which was ſubſcribed by the Defendant, upon the ſhip *Oxholme* and goods. The cargo was loaded on board the ſhip at the Iſland of *Saint Thomas* for the voyage inſured; and the ſhip *Oxholme* warranted in the policy to be a *Daniſh* ſhip at the time of lading of the goods on board, and of the making of the policy and until the capture and loſs after mentioned, *was a Daniſh ſhip, and the property of the ſaid J. Hazzell,*

A ſentence of a foreign court of prize is concluſive evidence in an action upon a policy of inſurance upon every matter within the juriſdiction of ſuch court upon which it has profeſſed to decide. Therefore where a *Daniſh* ſhip, *warranted neutral*, was captured by a *French* ſhip of war, (*Denmark* being at peace with *France*), and the court in which ſhe was libelled as prize, profeſſing to conſider that the *built* of the veſſel was *unknown*, that ſhe was *ſold* to a *neutral* ſubject *only ſince* the declaration of war, that the bill of ſale does not mention her *place of built* or her *original owner*, that the mate and third officer were naturalized *Danes only ſince* the declaration of war, and that the greater part of the *crew* were ſubjects of *hoſtile* powers, condemned the ſhip as *good and lawful prize*; ſuch condemnation is concluſive againſt the warranty of neutrality in an action on the policy againſt the underwriter; and no evidence could be received to falſify the facts affirmed by ſuch ſentence, nor to ſhew that the concluſion was unfounded: although the ſentence proceeded to refer to certain ordinances of *France* containing rules to direct the judgment of its Courts in the conſideration of the queſtion of neutrality; by which rules the Prize Court appear to have regulated their judgment in the concluſion they had drawn.

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Murphy and R. D. Jennings, and that the ſaid cargo were alſo *Daniſh* property of the ſaid *J. Hazzell*, &c. and the ſaid *J. H. J.*, *M.* and *R. D. J.* were, during all the time aforeſaid, *ſubjects of the King of* Denmark, *reſiding and domiciliated at the* Daniſh *Iſland of* St. Thomas, and *intereſted in the ſaid ſhip and cargo* to the amount of the ſum inſured. The ſhip when ſhe ſailed, and during her whole voyage, until, and at the time of the capture, had on board, *together with all other papers and documents uſually carried by* Daniſh *ſhips*, to ſhew that ſhe was a *Daniſh* ſhip, the papers following, *viz.* a *Latin* paſs, a *Mediterranean* paſs, a bill of ſale, a muſter roll, a meaſure brief, a certificate of property, and *every other document generally carried by* Daniſh *ſhips*. The firſt and ſecond mate, and other officers and the crew of the ſhip during the voyage were *Danes* and *Swedes*, except one man on board at the time of the capture, who alone was a ſubject of any nation in a ſtate of hoſtility to *France*. At the time of making the policy, until and at the time of the capture, there was open war between *Great Britain* and *France*. The ſhip with her cargo on board ſailed from *St. Thomas*, and in the courſe of the voyage inſured, was captured by two *French* frigates and carried into the *French* iſland of *Senegal*, where proceedings were inſtituted before the tribunal for determining queſtions of prize; when they proceeded, upon the grounds ſtated in the following ſentence, to condemn the ſhip and cargo as good and lawful prize, and ordered them to be ſold, and thereby they became wholly loſt to the aſſured. The ſentence of condemnation was as follows: "Liberty—Equality. I *Emlec Blanchot*, Commandant and Adminiſtrator of *Senegal*, &c. aſſiſted by Citizen *S. M.* chief of the civil courts of marine in this Iſland, *P. A.* and *P. B.* merchant, and *J. F. C.* regiſtrar

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giſtrar of this Colony, having ſeen the verbal proceſs of the capture of the ſhip *Oxholme* carrying *Daniſh* colours, Captain *J. Fowle*, ſeized the 30th of *Germinal* laſt by the frigate of the Republic *Regenerée*, commanded by Citizen *Williamets*, captain of a veſſel; having examined and compared all the inſtruments and papers relating to the ſaid ſhip *Oxholme*, particularly two muſter rolls, one in the *Daniſh* language, dated 15th *November* 1797, and the other in the *Engliſh* language, dated 17th *November* 1797, the bill of ſale of the aforeſaid ſhip, dated 24th *May* 1796, ſigned *J. H. J. Plewſher*; conſidering that the veſſel, of what built unknown, was ſold to a ſubject of a neutral power only ſince the declaration of the preſent war, and that the bill of ſale makes no mention either of her place of built or of her original owner; that the mate and the third officer were naturalized *Danes* only ſince the declaration of the preſent war; and the greater part of the white men of the crew are ſubjects of hoſtile powers; I decree the ſaid veſſel the *Oxholme* to be *good and lawful prize, conformably to the* 10*th* 11*th and* 12*th articles of the regulations concerning prizes of the* 21*ſt of* October 1744, which are thus worded: "Every veſſel of enemy's built, or which ſhall have been owned by an enemy, ſhall not be deemed to be neutral or belonging to an ally, if there be not found on board ſome authentic inſtruments, certified by public officers who may aſcertain the date of them, which prove that the ſale or tranſfer thereof was made to ſome one of the ſubjects of allied or neutral powers before the declaration of the war," &c. "No reſpect ſhall be paid to paſſports granted by neutral or allied powers to the owners or maſters of veſſels who are ſubjects of hoſtile ſtates, if they were not naturalized before the declaration of the preſent war." "All foreign

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veſſels ſhall be lawful prizes on board of which there ſhall be a ſupercargo, merchant, clerk, or marine officer of any of his Majeſty's enemies, or of which the crew ſhall conſiſt of more than in the proportion of one-third of ſeamen who are ſubjects of hoſtile ſtates." Accordingly, I decree the ſaid veſſel the *Oxholme* to be ſold in the uſual form, and the proceeds to be delivered to whom of right they belong. Done at the government houſe of the *French* iſland of *Senegal*, the 15th day of the month of *Prairial*, of the ſixth year of the *French* Republic, one and indiviſible. Signed *Paul Benis*, *Marca Malivon*, *Blanchot*, *Charbonier* Regiſtrar." But whether, &c.

Jennings for the Plaintiff contended, 1ſt, That the ſentence of the prize court appeared upon the face of it to be grounded upon *French* ordinances, which not being binding upon other nations who had not expreſsly ſtipulated by treaty to be bound by them, could not contravene the warranty of neutrality. 2dly, That the concluſion drawn in the ſentence was not warranted by the premiſes, which on the contrary rather tended to prove the warranty of neutrality; and 3dly, That the ſentence of a foreign court of admiralty was only binding in rem, ſo as to alter the property in the thing itſelf condemned as prize; but did not conclude the queſtion of neutrality ariſing in any other court of competent juriſdiction. He argued at length upon theſe topics, and cited many caſes. But it is unneceſſary to repeat arguments and authorities which have been ſo frequently and ably diſcuſſed of late, and particularly by all the Judges in the caſe of *Lothian* v. *Henderſon* in the Houſe of Lords, reported at length in 3 *Boſ.* and *Pull.* 499.

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Caſſels, for the Defendant, contended, 1ſt, That a warranty muſt be conſtrued ſtrictly; and that where a ſhip was warranted neutral, ſhe muſt be documented and navigated in ſuch a manner as to entitle her to all the privileges of neutrality wherever that queſtion comes into diſcuſſion. 2dly, That where a neutral ſhip is condemned by a foreign court of competent juriſdiction, whatever is decided by the ſentence of that court is concluſive in any other court here, where the ſame point comes in iſſue: and that although the point be not in terms decided, and the words of the ſentence be ambiguous, yet if it can be fairly collected what the foreign court meant or profeſſed to decide, it is equally concluſive. 3dly, That a general adjudication of *good and lawful prize* falſifies the warranty of neutrality. 4thly, That a ſentence of condemnation, formal or informal, juſt or unjuſt, with or without reaſons, if founded in any part of it on the ground of the ſhip's being conſidered as enemy's property, is concluſive againſt a warranty of neutrality. He admitted that ſome of the caſes had gone further, and had laid down, 5thly, That although there be in the ſentence a general adjudication of good and lawful prize, as the concluding or decretal part of it; yet that if the reaſons leading to the concluſion were therein ſtated, and thoſe reaſons did not either diſtinctly or by fair inference falſify the warranty of neutrality, the court would examine their validity, and receive other evidence dehors the ſentence upon the point of neutrality. But he contended that the reaſons ſtated did, fairly conſidered, falſify the warranty in this caſe. And further he admitted, 6thly, That where a ſhip has been condemned by a *French* court of admiralty, and as reaſons for that condemnation *French* ordinances are ſtated to have been broken, the court here have been

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considered at liberty to examine whether those ordinances were or were not conformable to the law of nations. But he contended that these ordinances were conformable to that law. He argued at length upon these several topics, and observed on some of the cases.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court.

Since the judgment of the House of Lords in *Lothian* v. *Henderson*, it may now be assumed as the settled doctrine of a court of *English* law, that all sentences of foreign courts of competent jurisdiction to decide questions of prize are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially. In this case, the question, How far the alleged neutrality of the ship *Oxholme*, described in the policy of insurance as a *Danish* ship, was, under the circumstances maintained, or falsified, is a question, to the decision of which the *French* prize court at *Senegal* was undoubtedly competent. And if that Court, before which proceedings for the condemnation of this vessel as prize were instituted, has, in the professed and actual exercise of the functions of a prize court, decided thereupon, such decision must have the effect of concluding the question. It remains, therefore, only to ascertain, by a reference to the terms of the sentence itself, whether it have so decided. In the first place, the Court, in every part of the sentence, considers the case depending before it as a case of litigated *neutrality*. It states the *Oxholme to have carried* Danish *colours, and* so far to have been

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been *oſtenſibly* a *Daniſh* veſſel. After mentioning the written documents belonging to the ſhip found on board, it ſuggeſts, as drawing its neutrality into ſuſpicion, that its *built was unknown*; and further, that it was *ſold to a ſubject of a neutral power only ſince the declaration of the preſent war*; and that *the bill of ſale made* no *mention* of her *place of built*, or of her original owner. It then exhibits the quality and deſcription of the officers and crew, as affording ſimilar matter of ſuſpicion, as affecting her neutrality; viz. "that the *maſter and the third officer* were NATURALIZED *Danes only ſince* the *declaration* of the PRESENT *war*;" and "*that the greater part of the white men of the crew were ſubjects of* HOSTILE *powers*" It then proceeds to *decree the* Oxholme to be *good and lawful prize*, conformably to certain regulations of *France* in the year 1744 concerning prizes; by which it is declared that veſſels of enemy's built *ſhould not be deemed neutral*: that the paſſports granted by neutral or allied powers ſhould not be *reſpected*, if granted to maſters of *veſſels* ſubjects of *hoſtile ſtates* and *not naturalized before the declaration of war*: and that veſſels ſhould *be lawful prizes* on board of which certain ſpecified officers, being *enemies*, ſhould be found, or of which the crew ſhould conſiſt of more than one third of ſeamen ſubjects of hoſtile ſtates. Looking, therefore, at the whole of the ſentence, including the ordinance to which it profeſſes to conform, it is impoſſible not to ſee that the *French* prize court canvaſſed and decided upon the probability of the ſhip's actually being, or the fitneſs of its being preſumptively deemed, enemy's property, or at leaſt not neutral, in reſpect of certain eſtabliſhed *indicia* on that head, collected together in the ordinance referred to. And having, in reſpect of ſuch

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circumſtances ſo ſtated and detailed, decreed the veſſel to be *good prize*, it appears to us that we ſhould do a violence to the fair meaning and import of the whole of the context if we ſhould hold the Court to have ſo decided and decreed upon any other ground than this, viz. that the fact, which is the ſubject of the warranty, was in their judgment ſubſtantially untrue. And having ſo decided, we are bound, upon the principles before ſtated, to give a concluſive effect to ſuch their judgment, and to hold the warranty of "*Daniſh* ſhip" to be thereby fully diſproved, and the plaintiff thereby alſo of courſe barred from recovering upon the policy in which ſuch warranty is contained.

Judgment for the Defendant.

Wedneſday, May 9th.

DOE, on the Demiſe of CHARLES WHITE, *againſt* SIMPSON and Another.

Under a deviſe of lands, arrears of rent and a bond and judgment to *truſtees* and *the ſurvivor* and *the executors*. &c. of ſuch ſurvivor, in truſt, *out of the rents and profits* of the ſaid eſtates and arrears, &c. to pay certain *annuities for lives*, and *a ſum in groſs*; and from and after payment of the ſaid annuities and money, the teſtator deviſed ſucceſſive eſtates for lives, remainder to *C. W.* in tail, remainder to his own right heirs; and he alſo gave a general power of *leaſing* to the truſtees for the beſt rent, with an allowance of 10*l.* a year to each for their trouble: held that *the purpoſes of the truſt being all anſwered*, by the death of the annuitants, and the raiſing of the money for legacies, the remainder-man in tail (the life eſtate being ſpent) took the *legal eſtate* in the premiſes. For where the purpoſes of a truſt may be anſwered by giving the truſtees a leſs eſtate than a fee, no greater eſtate ſhall paſs to them *by implication*; but the uſes in remainder limited on ſuch leſſer eſtate ſo given to them ſhall be executed by the ſtatute. And in this caſe it is ſufficient to anſwer the purpoſes of the truſt to give the truſtees by implication an eſtate *for the lives of the annuitants*, with *a term of years in remainder* ſufficient for the purpoſe of raiſing the groſs ſum charged *out of the rents and profits*. And this conſtruction is further confirmed in this particular caſe by the bequeſt to the truſtees of the *arrears and the bond and judgment*, as well as of the rents and profits; for otherwiſe the intereſt in the bond, &c. would go to different repreſentatives than the eſtate if the truſtees took a fee: and the *leaſing power* was only to be executed as the occaſions of the truſt required. And there was alſo a *perſonal* remuneration to the truſtees of 10*l.* a-year for their trouble, which was not extended to their *heirs*.

THIS was an ejectment for certain premiſes in the pariſh of *St. Matthew, Bethnal Green*, in *Middleſex*, brought by the firſt remainder-man in tail under the will

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of one *Charles White*, againſt the Defendant, who claimed as aſſignee of one *Hopkins*, under a leaſe granted in *Auguſt* 1786 by the executrixes of *Henry Hyatt*, the ſurviving truſtee under the will of *Charles White*, dated *July* 1754, and properly executed and atteſted; whereby the ſaid deviſor having firſt deviſed unto the ſaid *Henry Hyatt* all his meſſuages, lands, &c. whatſoever in the pariſh of *Willſdon* for life, with divers remainders over for life, remainder to *Charles White* in tail; and having given directions for the renewal of a certain church leaſe, &c.; proceeds as follows:

"I give and deviſe unto the ſaid Mr. *H. Hyatt*, my couſin *Fitz Ferrand*, and Mr. *Syddall*, and the ſurvivor of them, *and the executors and adminiſtrators of ſuch ſurvivor*, all thoſe my meſſuages, lands, &c. whatſoever, in *London*, *Kenſington*, and in the pariſh of *St. Matthew Bethnal Green*, *Middleſex*, together with all arrears of rent due from the tenants of the ſaid eſtates, and the bond and judgment I have from my tenant *John Sugar* for arrears due; in truſt, that they, *out of the rents and profits of the ſaid eſtates* and arrears due, ſhall pay one annuity of 50*l.* to my ſiſter Mrs. *Holme* for her life, by half yearly payments from the time of my deceaſe; and alſo to pay one other annuity of 50*l.* to my ſiſter Mrs. *Dickinſon* for her life by half yearly payments, for her ſole and ſeparate uſe, &c. And *from and after payment of the ſaid annuities*, then in truſt *out of the ſaid reſt and reſidue of the ſaid rents and profits* to pay to my brother *Thomas White*, and my nephew, his ſon, *Charles White*, and *Peter Holme*, and the ſurvivor of them, and the executors, &c. of ſuch ſurvivor, the ſum of 800*l.* to be *by them* paid and applied to the ſole uſe and benefit of the ſaid children of my ſaid brother *William*, in ſuch manner and proportion, and to and for

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such uses, &c. as they shall think best. And *from and after payment of the said annuities* and *the said sum of* 800*l.* I give and devise my said estates in *London* and *Middlesex* last mentioned to my brother *William* for life, remainder to his eldest son *William* for life, remainder to his second son *Samuel* for life, remainder to his third son *Charles* for life, remainder to his youngest son *John* for life, remainder to my brother *Thomas White* for life, and after his decease to his son, my nephew, *Charles White* (the lessor of the plaintiff,) *and his heirs male;* and for want of such issue to my right heirs for ever. And I do hereby give and grant unto the said Mr. *Hyatt*, Mr. *Ferrand*, and Mr. *Syddall*, and the survivor of them, and the executors and administrators of such survivor, full power and authority *to grant any building lease and leases, or any other lease and leases, as often as there shall be occasion, of the said estates so devised to them* in trust as aforesaid, or any part thereof, *for any number of years; so as* such lease and leases, so to be granted, be made *for the most or best rent* that can be had or got for the same, without any fine or income. And I hereby direct, that so long as the said Mr. *Ferrand* and Mr. *Syddall* shall act in the said trust, they shall *be paid or allowed every year the sum of* 10*l. a-piece for their trouble.* But it is my will and mind that they the said Mr. *Hyatt*, Mr. *Ferrand*, and Mr. *Syddall*, shall be only accountable for their own several acts," &c. The will contained other bequests not material to be stated. The devisor died in *July* 1754.

At the trial before Lord *Ellenborough* C. J. at the Sittings at *Westminster* after *Michaelmas* Term last, it clearly appeared that the lease under which the defendant claimed was void under the power granted to the trustees, the best rent not having been reserved; and the

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jury found a verdict for the leſſor of the plaintiff on that ground. But objection was taken at the trial, (which was reſerved to the defendants' counſel, with liberty to move to enter a nonſuit if the Court ſhould ſuſtain the objection), that the legal title was not in the leſſor of the plaintiff, the firſt remainder-man in tail under the will; but (all the truſtees being dead) in the heir of *H. Hyatt*, who ſurvived the other truſtees and died in *November* 1774. It appeared however, that of the two annuitants mentioned in the will, Mrs. *Holme* died in the lifetime of the deviſor, and Mrs. *Dickinſon* after him in the year 1762, and the laſt tenant for life died in 1803, immediately prior to the bringing this ejectment. Alſo the ſum of 800*l.* mentioned in the will had been raiſed and applied as long ago as *January* 1771, when all the purpoſes of the truſt were ſatisfied. Lord *Ellenborough* C. J. was of opinion at the trial that the truſtees did not take the legal eſtate for any longer time than the lives of the annuitants, and until the groſs ſum of 800*l.* was raiſed, and the purpoſes of the truſt ſatisfied: but if that were otherwiſe, yet after all the purpoſes of the truſt were at an end, he ſaid he would direct the jury to preſume a re-conveyance, if neceſſary, to the perſons beneficially entitled under the will. But it was afterwards objected by the defendants' counſel, that the power of leaſing was intended by the teſtator to be given to the truſtees during the continuance of the ſucceſſive particular eſtates carved out of the inheritance; and that the exerciſe of ſuch a power neceſſarily required a ſeiſin in fee of the truſtees to ſupport it. And thereupon the verdict was entered for the plaintiff, with liberty to the defendants to move to ſet it aſide and enter a nonſuit, if

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the Court ſhould be of opinion that the objection to the title of the leſſor of the Plaintiff were well founded. A rule niſi having been accordingly obtained in *Hilary* Term laſt for that purpoſe,

Wood (who was with *Erſkine* and *Garrow*) ſhewed cauſe againſt the rule; and contended that the truſtees took only a chattel intereſt under the will for the payment of the annuities during the lives of the annuitants, and for raiſing the ſum of 800*l.* for the legatees; and when thoſe purpoſes were anſwered, which they were as far back as 1771, the legal eſtate was limited over to the ſeveral takers for life, remainder to the leſſor of the plaintiff in tail, in whom it is now veſted in poſſeſſion. A deviſe to truſtees *and their executors and adminiſtrators*, for the payment of debts and legacies, has been often holden to give them only a chattel intereſt, and when the purpoſes are anſwered the legal eſtate goes over. As in *Co. Lit.* 42. *a.* "If a man deviſe his lands to his executors for payment of debts and until his debts be paid, they have but a chattel and an intereſt uncertain in the land until his debts be paid:" "and being a chattel, it ſhall go to the executor or executors for the payment of his debts." And ſo it was reſolved in Sir *W. Cordell's* caſe (*a*), and in *Hilchins* v. *Hilchins* (*b*). The deviſe to the truſtees, being alſo for the payment of the annuities for life, will not vary the queſtion; for the truſtees will take no greater eſtate than is ſufficient to anſwer the purpoſes of the truſt. In *Barnardiſton and others* v. *Carter*, in Dom. Proc. (*c*) under a deviſe to executors for payment of debts and legacies, it was decreed that they had but a chattel

(*a*) Cited in 8 *Rep.* 96. and *Cro. Eliz.* 316. (*b*) 2 *Vern.* 403.
(*c*) 1 *P. Wms.* 509. 519. 2 *Bro. P. C.* 1.

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intereſt. And by the report in *Brown* it appears that one of the legacies was a rent charge (*a*) for the lives of two perſons and the ſurvivor. In other caſes where the deviſe has been to truſtees and *their heirs* in truſt for payment of debts, legacies, and annuities, they have been holden to take no greater eſtate than ſuch as was commenſurate with the purpoſes of the truſt: after which the limitations over took effect as legal limitations; as in *Lord Say and Sele* v. *Lady Jones* (*b*). That was a deviſe to truſtees and their heirs in truſt to pay legacies and annuities, and to pay the ſurplus to a feme covert for life to her ſeparate uſe, and after her death the truſtees to ſtand ſeiſed to the uſe of the heirs of her body in tail general, ſubject to the payment of the ſeveral annuities; remainder over. And Lord Chancellor *King* held that the uſe was executed in the truſtees and their heirs during the life of the feme covert, and after her death it was executed in the perſons entitled to take charged with the annuities. [*Lawrence* J. I have heard Lord *Kenyon* ſay, that that was a ſingle caſe, ſtanding on its own grounds (*c*).] The ſame principle was eſtabliſhed in *Shapland* v. *Smith* (*d*), and in *Silveſter* v. *Wilſon* (*e*), that under a deviſe to truſtees to receive and pay out of the rents and profits annuities for lives, they ſhall have no greater eſtate than is ſufficient for the purpoſes of the truſts created. Then it is argued from the power of leaſing given to the truſtees, that the teſtator meant to give them a fee; but that is not the ne-

(*a*) This rent charge was given "*after* ſuch time as his *ſaid debts and legacies* ſhould be diſcharged;" and no queſtion was made on this ground.

(*b*) 3 *Bro. P. C.* 458. 8 *Vin. Abr.* 262.

(*c*) Vide *Harton* v. *Harton*, 7 *Term Rep.* 654.

(*d*) 1 *Bro. Ch. Rep.* 74. (*e*) 2 *Term Rep.* 444.

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ceſſary inference from the words of the deviſe. The power of leaſing was meant to be confined to the duration of the intereſt the deviſor had before given to the truſtees, and commenſurate only with the purpoſes of the truſt. And, a *power* to any extent may be granted to one without giving him the fee, or without giving him an intereſt commenſurate with the leaſe which he may grant. Beſides, the jury were inſtructed at the trial, that even if the legal eſtate continued in the truſtees after the purpoſes of the truſt were ſatisfied, yet the jury might preſume a re-conveyance of it by the truſtees to the remainder-man in tail, after thoſe purpoſes were anſwered. And here a ſufficient length of time has elapſed to warrant ſuch a preſumption; the laſt annuitant having died above 40 years ago, and the laſt of the legacies having been paid off in *January* 1771. In a caſe where much leſs time had elapſed, Lord *Kenyon* ſaid he would direct a jury to preſume a ſurrender of a ſatisfied term (*a*).

Gibbs, (*Park* and *Roſe* were with him) contrà, contended, that the deviſe to the truſtees to pay annuities for lives, and a groſs ſum out of the lands deviſed, gave them the fee, for otherwiſe the eſtate might not be ſufficient to anſwer the charge. *Cordell*'s caſe (*b*) was only a deviſe to *executors* to pay debts; a mere power to raiſe money: and the grounds on which *Barnardiſton* v. *Carter* was decided in the Houſe of Lords, cannot be collected from the report. But in *Jenkins* v. *Jenkins* (*c*), where an annuity was de-

(*a*) Vide *Doe* v. *Sapſi*, 2 *Term Rep.* 696., and *Goodtitle* v. *Jones*, 7 *Term Rep.* 49.

(*b*) Cited 8 *Rep.* 96., and *Cro. Eliz.* 316.

(*c*) *Willes*, 650., where the caſes are collected.

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viſed to one for life, to be paid out of certain lands by the executor to whom thoſe lands were afterwards deviſed, the Court had no doubt that the executor took an eſtate at leaſt during the life of the annuitant; and they inclined to think he took the fee; but that was not neceſſary to be decided, as the annuitant was ſtill living. But at any rate the leaſing power given to the truſtees ſhews an intention to paſs the fee to them; for it is clear that the duration of the leaſe could not depend upon the payment of the legacies. And as no ſuch power of leaſing is given to the tenants for life or in tail, the deviſor muſt have intended that the truſtees ſhould retain the power of leaſing during the continuance of thoſe eſtates at leaſt. The calling it a power will not prevent the implication of a fee to the truſtees, if the exerciſe of the power require them to take ſuch an eſtate. As to the preſumption of a re-conveyance by the truſtees, ſuppoſing them to take the fee, that was a fact for the jury, which they have not found.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment.

This was a motion for a new trial, (or that a nonſuit ſhould be entered) on the ground that the legal eſtate in the premiſes for which the ejectment was brought was not in the leſſor of the plaintiff, but in the heir of the ſurviving truſtee, under the will of one *Charles White*, made in the year 1752; and that conſequently the ejectment ſhould have been brought on the demiſe of ſuch heir of the ſurviving truſtee. The queſtion ariſes on the will of the ſaid *Charles White*, made the 1ſt of *December* 1752, (which his Lordſhip ſtated.) The leaſe under which the

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the defendant claimed has been found by the jury to be void, as not having been made purſuant to the leaſing power contained in the will: but it was contended by the counſel for the defendants, that the ejectment was ill brought in the name of *the leſſor of the Plaintiff, Charles White*, the *firſt remainder-man in tail*, for the reaſon before ſtated, viz. that the legal eſtate was not in him. The validity of which objection depends upon the queſtion, Whether the original truſtees took, by neceſſary implication ariſing from the whole of the will, (as the defendants' counſel contended they did,) an eſtate *in fee;* or, as the plaintiff's counſel contended, a *chattel intereſt*, or eſtate for ſuch limited period only as will be ſufficient to carry into execution the truſts of the will, *i. e.* for the purpoſe of ſecuring the payment of the two annuities of 50*l.* each, and the groſs ſum of 800*l.*? and whether after thoſe truſts were ſatisfied, the ſeveral limitations for life and in tail took effect as legal limitations? The caſe principally relied upon by the defendants' counſel, in ſupport of the propoſition that the truſtees took an eſtate in fee, was the caſe of *Jenkins* v. *Jenkins*, Lord C. J. *Willes's Rep.* 650. In that caſe the teſtator *John Jenkins*, being ſeiſed in fee, by his will gave one *Mary Harper* 5*l.* a-year to be paid her OUT OF THE PREMISES in queſtion *by his executor* as long as ſhe ſhould live, and to be paid quarterly, and the Court founded its opinion on this ground, viz. "that as the annuity was to be paid by "the *executor*, and to be paid *out of the eſtate*, the intent "of the deviſor could not take place unleſs the executor "had at leaſt ſuch an eſtate in the lands deviſed as would "laſt as long as the annuity was payable." And Lord Ch. J. *Willes* adds, "Whether he has an eſtate for the

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"life of the annuitant only, or in fee, we need not de-
"termine in this action, becauſe the annuitant is alive;
"but we are rather inclined to think that he took an
"eſtate in fee; becauſe there is no one caſe where a de-
"viſee by virtue of the word "*paying*" has been adjudged
"to have a larger eſtate than for his own life, in which
"it has not alſo been adjudged that he took an eſtate in
"fee." But in the preſent caſe nothing turns on the import of the word *paying*; nor was the payment directed by the will to be made by the truſtees *out of the eſtates* deviſed, ſo as to be a perſonal charge on them, but *out of the rents* and *profits* only; which words in a multitude of caſes have been holden not to give more than an eſtate for life, as the deviſee cannot be a loſer in reſpect of ſuch a charge. Of the ſeveral caſes cited by Mr. *Wood*, two of them which have the moſt immediate bearing on this queſtion, viz. *Shapland* v. *Smith*, 1 *Bro. Ch. Rep.* 75., and *Sylveſter* v. *Wilſon*, 2 *T. R.* 444. appear to eſtabliſh, that, if an eſtate for life be left to truſtees and their heirs, in truſt to *pay the* PROFITS *or an annuity out of* THEM to another for life, and after the death of the annuitant, or perſon entitled to the profits, if the eſtate be given to or to the uſe of another, in ſuch caſe the truſtees take only an eſtate for the life of the ceſtui que truſt or the annuitant, and the remainder over is executed by the ſtatute; and the authorities referred to, viz. *Co. Lit.* 42. *a. and Sir* W. Cordell's *caſe*, 8 *Co.* 96. eſtabliſh the propoſition, that if an eſtate be deviſed to executors generally for payment of debts, they will take only a chattel intereſt: from whence it appears to be a fair inference, that where the purpoſes of a truſt can be anſwered by a leſs eſtate than a fee ſimple, that a greater intereſt than is ſufficient to anſwer ſuch purpoſe ſhall

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not paſs to them; but that the uſes in remainder, limited on ſuch leſſer eſtate ſo given to them, ſhall be executed by the ſtatute. I have not met with any caſe in which the truſtees have been holden to take any other intereſt than either a chattel, an eſtate for life, or in fee: but I ſee no reaſon why they may not, in order to anſwer the purpoſes of the truſt, take an eſtate by implication for the lives of the annuitants, with a term of years in remainder ſufficient for the purpoſe of raiſing out of the rents and profits the ſum of 800*l.* directed to be paid out of the ſame. Such an eſtate might certainly be limited by expreſs terms in a deed or will. And the circumſtance of the bequeſt to the truſtees and the perſonal repreſentatives of the ſurvivor of them of the bond and judgment given to the teſtator by a tenant for arrears due, (and which is certainly a matter merely of a perſonal nature,) goes ſtrongly in confirmation of this conſtruction. For if the truſtees were meant to take a fee, then the legal eſtate in the land deviſed, and the intereſt in this bond and judgment, would go to different claſſes of repreſentatives of the ſame ſurviving truſtees; which apparent inconſiſtency is avoided, if the truſtees take the ſame deſcription of intereſt, (*i. e.* a chattel intereſt in the land,) as they reſpectively muſt do in the bond and judgment. It has alſo been argued on the part of the defendant, that from the terms and object of the *leaſing power* a neceſſary inference ariſes that the teſtator meant to give his truſtees an eſtate in fee. It does not, however, appear to me that the leaſing power fairly affords any ſuch inference. The teſtator gives them *power* and authority to grant *building or other leaſes*, as *often as there ſhould be occaſion*, of the *ſaid eſtates ſo deviſed to them* "in TRUST AS AFORESAID;" hereby evidently connecting the execution

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of the power with the particular truſt eſtates before created, and exhibiting an intention that the leaſing power ſhould be merely commenſurate therewith and auxiliary thereto. The teſtator alſo ſeems to have contemplated the period of the truſt, and of courſe the trouble attending the execution of it, as not being likely to endure beyond the lives of *Ferrand* and *Syddall*, two of the truſtees: for he directs that "ſo long as the ſaid Mr. *Ferrand* and "Mr. *Syddall ſhall act in the ſaid truſt they ſhall be paid* or "allowed *every year* the ſum of 10*l.* a-piece for their "trouble." To the other truſtee, *Hyatt*, to whom he had deviſed an eſtate for life for his own benefit in another eſtate in the beginning of his will, he of courſe thinks it unneceſſary to make this allowance. A yearly allowance made *to truſtees ſo long as they ſhould act*, is not very conſiſtent with an intention in the teſtator to impoſe that trouble upon the heirs of the ſame truſtees without any recompence made to *them* for *their trouble*, and that for ever. The argument on the part of the defendants is, that unleſs the leaſing power continue in the truſtees down to that period of time when ſome perſon ſhould take an eſtate under the will in reſpect of which he might be enabled to grant building leaſes, that the buildings might fall into utter ruin and decay; and that if the truſtees ſhould take this power only during the lives of the two annuitants, and for the time during which the 800*l.* may be raiſed, that the eſtate could not be benefited by the granting ſuch leaſes during the continuance of the ſeveral ſucceſſive eſtates for life, nor even during the continuance of the eſtates limited in tail; for tenants in tail are only enabled to make leaſes under the ſtat. 32 *H.* 8. *c.* 28.: and that for the avoiding of this inconvenience the eſtate deviſed to the truſtees muſt be conſtrued to be an eſtate in fee.

Admit-

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Admitting, however, that if the ſeveral deviſees for life ſhould ſurvive the period during which the truſt for the lives of the annuitants, and for raiſing the ſum of 800*l.*, may continue, the inconvenience ſuggeſted, viz. of the ſuſpenſion of the leaſing power for a limited time and to a certain degree might exiſt; at leaſt till the remainder-man in tail, by ſuffering a recovery, ſhould acquire to himſelf a power of making ſuch leaſes; ſtill, if the inconvenience ſhould ſubſiſt to a ſtill greater degree than it is likely to do, it would not warrant us in putting a conſtruction upon the will, in order to avoid it, which the terms of the will do not fairly and naturally in themſelves bear. And it appears to me that if we ſhould conſtrue the leaſing power as continuing beyond the duration expreſsly aſſigned to the truſts above mentioned, that we ſhould do a violence to the fair and obvious meaning of the terms in which that power is couched. Upon the whole, therefore, we are of opinion, that the truſtees took an eſtate by implication for the lives of the annuitants, with a term of years in remainder for the purpoſe of raiſing the ſum of 800*l.*; and that after thoſe truſts were (as they appear in evidence to have been) ſatisfied, the ſeveral limitations for life and in tail took effect as legal limitations; and of courſe that the leſſor of the plaintiff, the remainder-man in tail, had ſuch a legal eſtate in the premiſes at the time of bringing his ejectment as will enable him to make the demiſe laid in this declaration.

Rule diſcharged.

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DIXON and Others, Aſſignees of BATTIER and Son, Bankrupts, *againſt* BALDWEN and Another.

Saturday, April 12th.

IN trover for 18 bales of cotton twiſt, it appeared at the trial before Lord *Ellenborough* C. J. at the laſt Sittings at *Guildhall* that the goods in queſtion had been furniſhed by the defendants, cotton dealers at *Mancheſter*, to the order of the *Battiers*, traders living in *London*, whoſe courſe of dealing it was to ſend orders to the defendants for goods of this deſcription to be forwarded to *Metcalfe* and Co. at *Hull*, for the purpoſe of being ſhipped to the correſpondents of the *Battiers* at *Hamburgh*, and by thoſe correſpondents ſent to the perſons for whom the goods were intended. When the goods arrived at *Hull*, the *Metcalfes* received orders from the *Battiers* when and to whom to ſhip the goods at *Hamburgh*. This courſe of dealing had ſubſiſted between theſe parties from *January* 1800: and as the *Battiers* received orders from abroad for cotton twiſt, they gave orders from time to time to the defendants to ſend the goods to *Metcalfe* and Co. at *Hull, to be ſhipped for* Hamburgh *as uſual*. Of this import was the order for ſome of the goods in queſtion, which was ſent by the *Battiers* to the defendants in a letter dated 31ſt of *March* 1803, in which the goods were directed to be "packed in bales, marked G. S. (and a

Where *A.* and *B.*, traders living in *London*, were, in the courſe of ordering goods of the defendants, cotton manufacturers at *Mancheſter*, to be ſent to *M.* and Co. at *Hull*, for the purpoſe of being afterwards ſent to the correſpondents of *A.* and *B.* at *Hamburgh*; and on the 31ſt of *March A.* and *B.* ſent orders to the defendants for certain goods *to be ſent to* M. *and Co. at* Hull, *to be ſhipped for* Hamburgh *as uſual*; held that as between buyer and ſeller the right of the defendants to ſtop as *in tranſitu* was at an end when the goods came to the poſſeſſion of *M.* and Co. at *Hull*; for they were for this purpoſe the appointed agents of the vendees, and

received orders from them as to the ulterior deſtination of the goods; and the goods, after their arrival at *Hull*, were to receive a new direction from the vendees. But it was competent for *A.* and *B.*, who became inſolvent ſome time in *July*, but committed no act of bankruptcy till the 24th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*. And held that the circumſtances of the bankrupts having called a meeting of their creditors, and having taken legal advice, and being encouraged by the reſult of ſuch meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants, though done by the bankrupts in a ſituation of impending bankruptcy at the time; the defendants, at the time of ſuch giving up of the goods by the bankrupts, holding poſſeſſion of the goods upon a claim of right to ſtop them in tranſitu,

certain

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certain mark) for order, *and to be forwarded to Meſſrs.* Metcalfe *and Sons, to be ſhipped for* Hamburgh *as uſual;*" and another order for the remainder of the goods in queſtion, dated 11th of *May* 1803, was couched in ſimilar terms. The goods were accordingly ſent by the defendants to the *Metcalfes* at *Hull*, marked and made up in the manner directed. In the beginning of *July* following the *Battiers* ſtopped payment, of which the defendants being immediately appriſed, one of them proceeded to *Hull*, and ſtopped the goods in the hands of the *Metcalfes* on the 7th of *July*, and ſome time after in the ſame month took poſſeſſion of them, upon giving the *Metcalfes* an indemnity. Four of the bales had been actually ſhipped on board a veſſel about to proceed to *Hamburgh*, but they were afterwards re-landed upon the application of the defendants, and were returned to them with the reſt, which had remained in the warehouſe of the *Metcalfes* from the time of their arrival at *Hull*. One of the *Metcalfes*, who was examined as a witneſs, ſtated that at the time of the ſtoppage of the goods they held them for Meſſrs. *Battier*, and at their diſpoſal; that they accounted with the *Battiers* for the charges of the goods. And the witneſs deſcribed his buſineſs to be merely an *expeditor* agreeable to the directions of the *Battiers; a ſtage*, and *mere inſtrument* between buyer and ſeller. That he had no authority to ſell the goods, and frequently ſhipped them without ſeeing them. That the bales in queſtion were to remain at his warehouſe for the orders of *Battier* and ſon, and he had no other authority than to forward them. That at the time the goods were ſtopped he was waiting for the orders of the *Battiers;* that he had ſhipped the four bales, expecting to receive ſuch orders, and re-landed them becauſe none had arrived. That if the goods had been demanded

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manded by the *Battiers* before ſhipping, he ſhould have delivered them up to them. At the time when the defendants gave notice to the *Metcalfes* to ſtop the goods, they alſo applied to the *Battiers* to order them to be delivered up. The *Battiers* in the mean time called a meeting of their creditors in *London*, and a caſe was laid before counſel concerning their right to reſtore the goods to the defendants; the reſult of which meeting and opinion was ſtated in a letter of the 29th of *July* from the *Battiers* to the defendants, in which they inform them "that "yeſterday a meeting was held of our ſeveral creditors "reſident in *London*, when they unanimouſly reſolved that "it would be moſt for the intereſt of the concerned that "the affairs ſhould be put in truſt, and that the property "ſhould be divided from time to time amongſt the cre-"ditors. The opinion obtained from counſel, and which "we are happy to ſay agreed with our wiſhes, was like-"wiſe ſubmitted to their conſideration; *and it appeared* "*generally the opinion that the twiſt* (*a*) *in* Hull *ſhould be* "*given up.*" There was alſo another letter of the 7th of *September* from the *Battiers* to the defendants, incloſing a ſtatement of their affairs; in which they obſerve, that the defendants' "claim is ſtated according to what we "conceive it to be, *after deduction of the goods ſtopped at* "Hull." The *Battiers* committed no act of bankruptcy till the 26th of *September* 1803, on which act of bankruptcy a commiſſion iſſued on the 1ſt of *October*. The aſſignees afterwards demanded the goods, which the defendants refuſed to deliver up. Two queſtions were made at the trial, 1ſt, Whether the defendants had a right to ſtop the goods as *in tranſitu* at the time they took poſſeſſion of them: or if they had not, 2dly, Whether the

(*a*) The goods in queſtion.

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Battiers were in a condition to reſcind the contract; and if ſo, whether they had done any act amounting to a reſcinding of the contract before their bankruptcy? On the firſt queſtion Lord *Ellenborough* inclined againſt the right of ſtopping in tranſitu under the circumſtances of the caſe: and upon the other ground, his Lordſhip left the queſtion to the jury, whether or not the conſent of the *Battiers* to the reſcinding of the contract and returning the goods, given before the act of bankruptcy, were given bonâ fide, and without any intention of a voluntary and undue preference; which he inclined to think it was; it being after legal advice taken, and upon a conference with their creditors at a public meeting. And the jury found a verdict for the defendants. A rule niſi was obtained on a former day for ſetting aſide the verdict and having a new trial on the grounds, that the tranſit of the goods was at an end at the time when they were ſtopped by the defendants, and that nothing afterwards happened which could amount to a reſcinding of the contract on the part of the creditors, or of the bankrupts, whoſe ability to reſcind it without the concurrence of the creditors was under the circumſtances denied.

Garrow, *Topping*, and *Wood*, ſhewed cauſe againſt the rule. 1ſt. The Defendants were entitled to ſtop the goods in tranſitu in the hands of the *Metcalfes* who were middlemen between the vendors and vendees. *Hull* was not the ultimate place of their deſtination, but they were ordered to be ſent there for the declared purpoſe of being ſhipped to *Hamburgh*. The ultimate place of deſtination then, as between theſe parties, was *Hamburgh*, and the goods were ſtill in tranſitu till they got there into the hands of the correſpondents of the *Battiers*. The *Met-*

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ealſes were not the excluſive acknowledged agents of the bankrupts, but were middle-men. They deſcribed themſelves as *expediters*, and a *mere ſtage*. Their duty was analogous to that of a wharfinger, in whoſe hands, as in thoſe of a mere carrier, goods may be ſtopped. *Stokes* v. *La Riviere* (*a*), and *Hunter* and another, aſſignees of *Blanchard* and *Lewis*, v. *Beal* (*b*), carried the right of ſtopping in tranſitu further than this caſe. In the latter the goods had been ſent to the inn in the place where the bankrupts lived, who had given orders to the book-keeper to ſend them down to the quay in order to have them ſhipped to be carried to *Boſton*; and they were accordingly ſent; but being too late for the ſhip were ſent back again to the inn, where they were ordered by the bankrupts' ſervant to be kept a few days longer till another ſhip was ready. In that caſe a new direction had been given to the goods by the bankrupts, and yet the vendor's right to ſtop in tranſitu was holden ſtill to continue, and did prevail. But here *Hamburgh* was the known ultimate place of deſtination in the firſt inſtance. The right of ſtopping in tranſitu is now become a legal and not a mere equitable right, as it was perhaps at firſt conſidered. It was ſo conſidered by Lord *Loughborough* in delivering the judgment of the Court of Exchequer Chamber in *Maſon* v. *Lickborrow* (*c*), who refers to Lord *Hardwicke*'s opinion in *Snee* v. *Preſcott* (*d*). [*Groſe* J. If you refer

(*a*) Sittings after *Michaelmas* 1784, at *Guildhall*, before Lord *Manſfield* C. J. This caſe was cited from the argument of counſel in *Ellis* v. *Hunt*, 3 *Term Rep.* 466., but Lord *Ellenborough* C. J. obſerved that there was a more correct note of the caſe given by Mr. Juſtice *Lawrence* in delivering the judgment of the Court in *Bohtlingk* v. *Inglis*, 3 *Eaſt*, 397.

(*b*) Sittings after *Trin.* 1785, at *Guildhall*, cor. Lord *Mansfield* C. J. cited in 3 *Term Rep.* 466.

(*c*) 2 *H. Blac.* 364, &c. and caſes there cited. (*d*) 1 *Atk.* 245.

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further back to the case of *Wiseman* v. *Vandeput* (*a*), you will find that the right of stopping in transitu was originally put upon a ground of equity, which has since grown into law.] It was expressly stated to be a legal right and not merely founded on principles of equity, by Lord *Mansfield* in the case of the assignees of *Burghall* v. *Howard* (*b*), and by the Court of *C. B.* in *Oppenheim* v. *Russel* (*c*). [Lord *Ellenborough* C. J. It must have been considered as a legal right in *Behtlingk* v. *Inglis*, 3 *East*, 381., for there the consignors maintained trover against the assignees of the consignee upon a mere demand and refusal of the goods by the captain before they were delivered.] The right then, being founded in justice and the common law, ought to be extended as far as it may consistent with the principle on which it is founded, that is, till the goods arrive at their ultimate place of destination, and have been taken possession of by or on the behalf of the vendee or consignee. In *Hodgson* v. *Loy* (*d*), even part payment was deemed not to take away the right of stopping in transitu; and the right being founded in honesty, courts have always leant in support of it. This was a case of dealing for the *export* trade: and all the cases which have been decided against the exercise of the right, have been cases of *inland* dealings. The goods were sent to the *Metcalfes* at *Hull*, merely as a stage on their way to *Hamburgh*. In *Hunt* and others, assignees of *Bennet* and *Heaven*, v. *Ward* (*e*), a delivery of the goods to a packer, even by the order of

(*a*) In 1690, 2 *Vern.* 203.

(*b*) At *Guildhall* Sittings after *Hil.* 32 *G.* 2., cited in 1 *H. Blac.* 365, 6.

(*c*) 3 *Bos. & Pull.* 42. (*d*) 7 *Term Rep.* 440.

(*e*) Which came on upon a motion for a new trial in this court a few years before the case of *Ellis* v. *Hunt*, in 1789, cited in 3 *Term Rep.* 467.

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the vendee, did not conclude the right of the vendor to ſtop them in tranſitu; the packer being conſidered as a middleman. In *Leeds* v. *Wright* (*a*), where goods ſent from *Mancheſter* on account of a houſe in *Paris* were conſidered as no longer in tranſitu after they were in the hands of the packer in *London*, the vendee's agent alſo lived in *London*, and had an authority to diſpoſe of the goods where he pleaſed, and might have made *London* the place of their ultimate deſtination. It was therefore not merely a conſtructive but an actual delivery. And in *Scott* v. *Pettit* (*b*) the like determination was made on the ground that the conſignee had no other warehouſe than that of his packer, where all goods conſigned to him were lodged, and which was therefore their ultimate place of deſtination.

On the ſecond ground they contended, that it was competent for the vendees, the *Battiers*, at any time before their bankruptcy, to renounce the goods, unleſs it were done with a fraudulent view to give the vendors an undue preference over the reſt of the creditors. This was ſettled in *Alderſon* v. *Temple* (*c*). But the letters negative ſuch a concluſion. For the goods were directed to be reſtored after legal advice taken, and with the general approbation of the meeting of the creditors convened upon the bankrupt's affairs in *London*. Till the act of bankruptcy the trader, though failing, has the legal right to diſpoſe of his property, unleſs it be done with a fraudulent view of preference. The queſtion then always is, *Quo animo* the act was done? If the reſtitution were made bonâ fide, as it appears here, by the conſent of all intereſted whoſe opinions could then be taken, that makes an end of the queſtion. The meeting of the creditors was on the 25th

(*a*) 3 *Boſ. & Pull.* 320. (*b*) *Ib.* 469. (*c*) 4 *Burr.* 2239.

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of *July* 1803, when the queſtion was canvaſſed and counſel's opinion taken; which being favourable to the defendants, the bankrupts wrote on the 29th of *July* to the defendants to inform them that it was conſidered as the general opinion that the goods ſhould be given up to them. Without this aſſurance the defendants might have reſorted to legal proceſs; for the bankruptcy was not till the 26th of *September*. And if the goods had been delivered up in *July* on a threat of legal proceſs, no doubt the delivery would have been legal. *Thompſon* v. *Freeman* (*a*). For even a demand for ſecurity will juſtify the creditor ſo obtaining it. *Smith* v. *Payne* (*b*). On the queſtion of undue preference they alſo referred to *Cock* v. *Goodfellow* (*c*), *Small* v. *Oudley* (*d*), *Harman* v. *Fiſher* (*e*), and *Hartſhorn* v. *Slodden* (*f*); and concluded that at all events it was a queſtion for the jury *quo animo* the goods were returned, which they had decided in affirmance of the act of reſtitution.

Erſkine and *Gibbs*, in ſupport of the rule (*g*), contended, 1ſt, That as between the buyers and ſellers of the goods, who were the *Battiers* on the one hand, and the defendants on the other, the goods had reached the place of their deſtination, and were no longer liable to be ſtopped in tranſitu after they had come to the hands of *Metcalfe* and Son at *Hull*. Their ulterior deſtination from *Hull* depended altogether upon the orders of the *Battiers*, who

(*a*) 1 *Term Rep.* 155.
(*b*) 6 *Term Rep.* 152.
(*c*) 10 *Mod.* 489.
(*d*) 2 *P. Wms.* 427.
(*e*) *Cowp.* 117.
(*f*) 2 *Boſ. & Pull.* 582.

(*g*) I was not in court when the caſe was argued by the plaintiffs' counſel; but what follows is ſelected from the arguments urged when the rule niſi was obtained, and from the relation of Gentlemen who were preſent when it was finally heard and determined.

might

might have diſpoſed of them as they thought proper; and the *Metcalfes* held the goods altogether at the diſpoſal of the *Battiers*, and were waiting their orders when the ſtoppage took place. This caſe, therefore, comes within the ſame principle as thoſe mentioned where the tranſitus was deemed to be at an end. And if it were not ſo, then there would be two ſets of perſons who would have the right of ſtopping the goods in tranſitu in their progreſs from *Hull* to *Hamburgh*, namely, the original vendors, and the *Battiers*, who would become vendors with reſpect to their own correſpondents abroad; but it has never yet been conſidered that the right of ſtopping goods in tranſitu can be exerciſed by two different ſets of perſons at the ſame time. 2dly, They contended that the bankrupts had no authority to reſcind the contract after having declared their inſolvency and called a meeting of their creditors: but even if they had had ſuch a power, they had not in fact reſcinded the contract; but only informed the defendants of what they ſuppoſed the creditors meant to do: and that the ſtoppage of the goods by the defendants was not in conſequence of the letter of the bankrupts on the 29th of *July*; but had taken place long before, upon an indemnity given by the defendants to the *Metcalfes*, and founded on an aſſumption of their right as vendors to ſtop them as ſtill in tranſitu.

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Lord ELLENBOROUGH C. J. There are two queſtions in this caſe; the firſt, whether a right to ſtop as *in tranſitu* exiſted in the defendants, the ſellers of theſe goods, on the *7th of* July, when they were ſtopped in the hands of *Metcalfe* at *Hull*: the ſecond, whether ſuppoſing ſuch right not to have exiſted in them at the time of ſuch ſtopping, the conſent to their retaining theſe goods, which

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was afterwards given by the *Battiers*, were, under all the circumſtances, a valid and effectual conſent, or whether it be impeachable on the ground of its being a voluntary preference in contemplation of their then impending and probable bankruptcy; on which ground alone it has been ſought to be impeached both at the trial and upon the rule now pending. The ſtrongeſt caſes cited by the defendants' counſel in favour of their right to ſtop in tranſitu, are the caſes of *Hunter* v. *Beale*, cited in *Ellis* v. *Hunt*, 3 *T. R.* 467., and *Stokes* v. *La Riviere*, cited in *Bohtlingk* v. *Inglis*, 3 *Eaſt*, 381. As to the firſt of theſe caſes, *Hunter* v. *Beale*, in which it is ſaid that the *goods* muſt come to the *corporal touch of the vendees*, in order to ouſt the right of ſtopping in tranſitu, it is a *figurative* expreſſion, rarely, if ever, ſtrictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other perſon, it comes in each inſtance to a queſtion, whether the party to whoſe touch it actually comes be an agent ſo far repreſenting the principal, as to make a delivery to him a full, effectual, and final delivery to the principal, as contradiſtinguiſhed from a delivery to a perſon virtually acting as a carrier or mean of conveyance to or on the account of the principal, in a mere courſe of tranſit towards him. In *Hunter* v. *Beale*, Sittings after *Trin.* 1785 before Lord *Mansfield*, I cannot but conſider the tranſit as having been once completely at an end in the direct courſe of the goods to the vendee, i. e. when they had arrived at the innkeepers, and were afterwards, under the immediate orders of the vendee, thence actually launched again in a courſe of conveyance *from him*, in their way to *Boſton*; being in a new direction preſcribed and communicated by himſelf. And if the tranſit be once at an end, the delivery is complete, and the tranſitus for this purpoſe

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cannot commence de novo merely becauſe the goods are again ſent upon their travels towards a new and *ulterior deſtination*. As to the caſe of *Stokes* v. *La Riviere and Lawley*, the goods were claimed in ſuit by the plaintiff the ſeller, from the defendants, to whom the goods were delivered to be forwarded to their (i. e. defendants) correſpondents *Meſſrs. Duhems of Liſle*: the *Duhems* were therefore the conſignees, and *Liſle* the ultimate place of deſtination. Upon the inſolvency of the *Duhems*, *La Riviere* and *Lawley*, the defendants, withdrew the goods from the hands of *Bine*, *Overman*, and Co. of *Oſtend*, to whom they had ſent them in a courſe of conveyance towards and for the *Duhems* at *Liſle*. *La Riviere* and Co. inſiſted, as againſt the plaintiffs, that upon the delivery of the goods to them for the *Duhems*, the property was veſted in the *Duhems*, in *whoſe right* (but for their own benefit in account with the *Duhems*) they claimed to detain the goods. This however, in reſpect of the *Duhems*, on whoſe right the defendants ſtood, was clearly a caſe of tranſit not finiſhed at the time of the claim made. The caſe of *Hodgson* v. *Loy* was alſo a clear caſe of tranſit uncompleted; for the butter, purchaſed in *Cumberland*, was proceeding through different ſtages of county conveyance to *E. Ward*, the purchaſer in *London*; but before it reached the place of its deſtination, it was ſtopped: and the only very material queſtion in that caſe was, whether a *part payment* by the purchaſer took the caſe out of the common rule, and ouſted the ſeller's otherwiſe unqueſtionable right to ſtop in tranſitu? The late caſes which have been cited of *Leeds and another* v. *Wright* (*a*), and *Scott and others aſſignees* v. *Pettit* (*b*), are authorities to the ſame effect. In the former the tranſitus was holden to be at an

(*a*) 3 *Boſ. & Pull* 320. (*b*) *Ib.* 469.

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end when the goods had reached the defendant, who was the packer of one *Morſſeron*, a general agent of *Le Grand* and Co. at *Paris*, and who had a general power of diſpoſal in reſpect to them, and might have ſent the goods either to his principals at *Paris*, or to *Holland*, *Germany*, or ſuch other market as he ſhould think beſt. And the latter caſe, ſimilar in many circumſtances to the former, was decided on the ſame ground, viz. that the tranſitus of goods is only not at an end upon their reaching the packer, where they remain with him for the purpoſe of being forwarded on to ſome ulterior appointed place of deſtination. But here, as in thoſe caſes, the goods had ſo far gotten to the end of their journey, that they waited for new orders from the purchaſer to put them again in motion, to communicate to them another ſubſtantive deſtination, and that without ſuch orders they would continue ſtationary. As to the ſecond queſtion, I continue to think as I thought at the trial, that the bankrupts were competent to reſcind, and had in fact reſcinded, the contract for the ſale of theſe goods. The circumſtances of deliberation, conſent of creditors, advice of counſel, and the publicity which attended the whole of the meaſure, exempted it from being properly conſidered as a fraudulent preference in contemplation of bankruptcy. That the *Battiers* muſt have conſidered themſelves in a ſtate of inſolvency and impending bankruptcy at the time, cannot be doubted; but until an act of bankruptcy the jus diſponendi over goods remains by law with the trader, unleſs he exerciſe it by way of a voluntary and fraudulent preference of a particular creditor in contemplation of bankruptcy. But here the goods were given up, if not from a threat of litigation, at leaſt under an idea of the right being probably adverſe to the claim of the bankrupts and their creditors. And volun-

tary favour towards the defendants did not operate as any inducement with the bankrupts to recede from their rights on this occaſion. The queſtion whether under all the circumſtances they acted bonâ fide in giving up the goods, or from a motive of voluntary and undue preference to the defendants, was left to the jury, who by their verdict have affirmed that the bankrupts acted bonâ fide, and have negatived any voluntary preference.

GROSE J. was of opinion, on the firſt point, that the right to ſtop in tranſitu was not at an end when the defendants took poſſeſſion of the goods. But if it were, he thought on the ſecond point, that the queſtion had been properly left to the jury, who had found that this was not a voluntary preference.

LAWRENCE J. agreed with Lord *Ellenborough* on the firſt point, that the goods had before their ſtoppage by the defendants arrived at their ultimate place of deſtination as between theſe parties, and conſequently that they had no right to ſtop them as in tranſitu. But on the ſecond point, that the letter of the 29th of *July* was no recognition on the part of the bankrupts of the act of the defendants in ſtopping the goods, nor an agreement to reſcind the contract. On the contrary, it imported that they did not chuſe to do any thing without the approbation of the creditors at large. The object of that letter was to give the defendants information that the creditors in *London* had met, and that the creditors who attended that meeting ſeemed diſpoſed to give up the goods; but not taking upon themſelves (the *Battiers*) the diſpoſition of them; but referring every thing to the creditors. And there was no aſſent of the creditors to the ſtoppage by the defendants.

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LE BLANC J. agreed that the tranſit of the goods was at an end before they were ſtopped by the defendants. As between the buyer and ſeller they were arrived at the place of their deſtination when they got to the poſſeſſion of the *Metcalfes* at *Hull*; for till the *Metcalfes* received directions from the *Battiers* they did not know where to ſend the goods. The warehouſe of the *Metcalfes* at *Hull* muſt therefore be conſidered as the warehouſe of the *Battiers*. With reſpect to the caſe of *Hunter* v. *Beale*, he obſerved that the merchants there (the vendees) having given the goods a different direction after they got to the inn, and before they were ſtopped, he ſhould have thought that the tranſit was at an end. Upon the ſecond point, whether the goods were bonâ fide delivered up to the defendants, he thought it a point of conſiderable difficulty on the evidence as it appeared before the Court. The letter of the 29th of *July* referred to ſome antecedent correſpondence, and to ſome legal opinion which had been taken; ſuch prior letter might have contained a propoſal or demand by the defendants to the *Battiers* to give up the goods; and if ſo, their anſwer might be evidence of their agreeing to renounce them; but the evidence was very ſlight. If that letter meant merely to declare the ſenſe of the greater part of the creditors in *London*, it would be going too far to ſay that it amounted to an abſolute aſſent to the defendants taking back the goods. The evidence, however, though ſlight, was fit for the conſideration of the jury, and they have found for the defendants.

Rule diſcharged.

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THE parties, by their reſpective bonds of ſubmiſſion, dated 20th of *Auguſt* 1803, bound themſelves to ſubmit certain matters in difference to the arbitration of *A.* and *B.* And if they did not make their award on or before the 21ſt of *September* then next, then to the umpirage of *C.* ſo as he made his umpirage on or before the 24th of *September* 1803. By a memorandum on the bonds dated 21ſt of *September*, it was thereby agreed between the ſaid parties, that the ſaid arbitrators making their award ſhould be extended from that day unto the the 24th of *September* aforeſaid, and for making the umpirage to the 1ſt of *October:* and by another indorſement on the bonds ſigned by the parties on the 28th of *September*, the time for making the umpirage was further extended to the 6th of *October*, which indorſement was ſtamped with an agreement ſtamp. By an umpirage made on the 5th of *October*, *Thomſon* was directed to pay 986*l.* 11*s.* 2*d.* to *Evans* by two inſtalments, one on the 4th of *November* laſt, the other on the 6th of *January* 1804. *In the bonds of ſubmiſſion it was provided that the bonds and ſubmiſſion thereby made, ſhould be made a rule of Court purſuant to the ſtatute, if either of the parties ſhould require the ſame and the Court ſhould ſo pleaſe.* But when the time for making the award was agreed to be *enlarged* by the indorſement on the bonds before-mentioned, *it was not added that that ſhould be made a rule of Court.* By a rule of Court made on *Saturday* next after the octave of *St. Martin* in *Michaelmas* Term laſt, reciting the bonds of ſubmiſſion, and that the ſubmiſſion was agreed to be made a rule of Court,

Where parties by an indorſement in general terms on the bonds of ſubmiſſion to arbitration agree that the time for making the award ſhall be enlarged, ſuch agreement virtually includes all the terms of the original ſubmiſſion to which it has reference, amongſt others that the ſubmiſſion for ſuch enlarged time ſhall be made a rule of Court: and conſequently the party is liable to an attachment for non-performance of an award made within ſuch enlarged time, under the ſtat. 9 & 10 *W.* 3. *c.* 15.

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Court, and that the parties had afterwards, by the ſaid indorſements, agreed to enlarge the time in the manner before-mentioned, it was ordered that ſuch the preſents and ſubmiſſion made in manner aforeſaid be made a rule of Court. The umpirage having been made within the enlarged time, and the defendant not having performed what he was therein directed to do, an attachment was moved for againſt him. Whereupon a rule was obtained calling on the plaintiff to ſhew cauſe why the laſt-mentioned rule of *Michaelmas* Term for making the ſubmiſſion, &c. for ſuch enlarged time a rule of Court ſhould not be amended by confining ſuch rule to the ſubmiſſion made by the bond and condition therein recited, and excluding the two ſubſequent indorſements of the 21ſt and 28th of *September* for enlarging the time, &c.

This rule was obtained on the authority of *Jenkins* v. *Law* (*a*), where it was determined, that an agreement to enlarge the time for making an award muſt contain a new conſent that it ſhall be made a rule of Court, otherwiſe no award made within ſuch enlarged time can be enforced by attachment.

Wood and *Wetherell* ſhewed cauſe againſt the rule, and denied the authority of the above-mentioned caſe, which they ſaid paſſed without obſervation; and that it was plainly the intention of parties to an arbitration, who agreed by an indorſement upon the ſubmiſſion bonds to enlarge the time for making the award, to include all the terms of the original ſubmiſſion, one of which was, that it ſhould be made a rule of Court. That without reference to the contents of the ſubmiſſion bonds, ſuch indorſement was not intelligible; and if reference were

(*a*) 8 *Term Rep.* 87.

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neceſſarily made to any part of the contents, it muſt in reaſon be made to the whole of them.

Erſkine and *Marryat*, in ſupport of the rule, inſiſted on the authority of the caſe of *Jenkins* v. *Law*, which was grounded on the act of 9 and 10 *W.* 3. *c.* 15. which enables litigant parties "to agree that their ſubmiſſion of "their ſuit to the award, &c. ſhall be made a rule of "Court, and *to inſert ſuch agreement* in their ſubmiſſion, "or *the condition of the bond or promiſe* whereby they oblige "themſelves reſpectively to ſubmit to the award, &c. "which agreement being ſo made, *and inſerted in their "ſubmiſſion or promiſe, or condition of their reſpective bonds*, "ſhall on affidavit, &c., be entered of record in ſuch "Court, and a rule thereupon made, &c., *purſuant to "ſuch ſubmiſſion*, &c." and then it provides that the party neglecting to obey the award, ſhall be ſubject to all the penalties of contemning a rule of Court. To give the Court juriſdiction therefore, the agreement to make the ſubmiſſion to arbitration a rule of Court, muſt, by the expreſs words of the act, be inſerted in the condition of the bond or promiſe. It was ſo inſerted in the bond; but that by the lapſe of time became functus officio, and then the agreement was made, which does not expreſs that the agreement ſhall be made a rule of Court, but merely that the time ſhall be enlarged. That agreement is diſtinct from the bond, and cannot be incorporated into it; for no action would now lie on the bond (*a*), but it muſt be brought on the agreement; and the inſtruments are ſo far diſtinct, though on the ſame piece of paper, that they required and actually have different

(*a*) *Brown* v *Goodman*, E. 29 G 3 *B. R.* cited in *Lutler* v. *Holland*, 3 *Term Rep* 592.

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ſtamps. It was certainly competent to the parties to agree to enlarge the time without agreeing to have their ſubmiſſion again made a rule of Court. Then having mentioned the one and not the other, there is no reaſon for extending their agreement by implication.

Lord ELLENBOROUGH J. C. ſaid it was a caſe of conſiderable conſequence, affecting the practice of all the Courts, upon the conſtruction of a very beneficial act of parliament; and therefore, before the Court gave their final opinion they would conſult with the other Judges: though, as at preſent adviſed, it appeared to him that the memoranda endorſed on the ſubmiſſion-bond for enlarging the time did, by neceſſary conſtruction, virtually incorporate all the conditions in the bond to which they had reference. That they muſt be taken to do ſo to a certain extent was apparent; for in themſelves the memoranda did not even ſpecify the names of the arbitrators or umpire, nor the ſubject-matter of the reference; and if any part were adopted, he could not ſee what line could be drawn, and why the whole muſt not be adopted.

Cur. adv. vult.

His Lordſhip now delivered the opinion of the Court.

This matter came on before the Court in the beginning of this term, upon a rule to ſhew cauſe why a rule made in laſt *Michaelmas* term ſhould not be amended by confining ſuch rule to the ſubmiſſion made by the bond and condition therein recited, and excluding the two ſubſequent memorandums or indorſements, bearing date the 21ſt and 28th of *September* laſt, &c. By the condition of the arbitration-bond the arbitrators were to make their award

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on or before the 21ſt of *September* laſt, and the umpire to make his umpirage on or before the 24th of the ſame month. On the 21ſt of *September* the parties agreed that the time for the arbitrators making their award ſhould be enlarged to the 24th of *September*. And on the 28th of *September* they agreed that the time for the umpirage ſhould be extended to the 1ſt of *October*. The umpirage was made within the time to which by this agreement the authority of the umpire was extended, and the agreement to enlarge was made a rule of Court. It was objected on the part of the defendant that the award of the umpire was not capable in this caſe of being enforced as a rule of Court, on the authority of the caſe of *Jenkins* v. *Law*, 8 *Term R.* 87.; the agreement to enlarge the time of making the award containing no expreſs conſent that ſuch agreement ſhould be made a rule of Court. But, upon conſidering that caſe, in which the objection appears to have been given way to without any argument on the part of the counſel who had obtained the rule for an attachment, and on which account the matter was probably not brought under the immediate view and attention of the Court; and upon conferring, with a view to an uniformity of practice on this ſubject, with moſt of the Judges of the other Courts of *Weſtminſter Hall*, we are of opinion that the caſe referred to cannot be ſupported; and that the agreement to enlarge the time for making the award muſt be underſtood as by reference virtually incorporating in itſelf all the antecedent agreements between the parties relative to that ſubject, as if the ſame had been formally ſet forth and repeated therein, and of courſe incorporating, amongſt the reſt, the agreement contained in the condition of the bond, that the ſubmiſſion to arbitration ſhould be made a rule of Court; and that, with reference

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to the enlarged time, inſtead of the time originally ſpecified in the condition of the bond.

Rule diſcharged. And

Rule for Attachment abſolute.

Friday, May 11th.

SANDBY, Clerk, *againſt* MILLER.

The *London* Court of Requeſts have juriſdiction, by the ſtat. 39 & 40 *Geo.* 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.*; and therefore if the vicar ſue for the ſame and recover leſs than 5*l.* upon a count in aſſumpſit for a quantum valebant, the defendant may enter a ſuggeſtion on the roll, ſtating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was ſerved with the writ, for the purpoſe of ouſting the plaintiff of his coſts under the 12th ſection of the act.

THE plaintiff brought aſſumpſit to recover the value of tithes due to him, as vicar of *St. Giles, Camberwell*, from the defendant, who occupied certain tenements within the vicarage, and for which he had for two years before paid a compoſition at ſo much an acre: but latterly the number of acres being in diſpute, the defendant refuſed to pay the ſum demanded by the vicar, who thereupon brought this action at the Sittings at *Weſtminſter*, before Lord *Ellenborough* C. J., when he recovered a verdict for 7*s.* 6*d.* upon a count for a quantum valebant (*a*), which, together with 2*l.* 14*s.* 3*d.* paid into court, conſtituted the original amount of the plaintiff's demand, as appeared by an account delivered by him to the defendant before the action brought, and alſo by a bill of particulars obtained afterwards. It appeared that the plaintiff did not reſide within the juriſdiction of the Court of Requeſts in the City of *London*, but that the defendant, though he reſided at times at his houſe at *Peckham Rye*, in *Surry*, yet alſo kept a ſhop and carried on trade within the city. The defendant, in the laſt Term, upon an affidavit that he was a freeman and inhabitant within the city of *London* at the time when the action was brought, and that he was ſerved with the writ within the city, obtained a rule *niſi* for leave to enter a ſuggeſtion on the roll under the ſtat. 39 & 40 *Geo.* 3.

(*a*) The firſt count of the declaration was on a compoſition for tithe.

c. 104.

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c. 104. (local acts), "for extending the powers of the "Court of Requests in the city of *London*," that the original cause of action did not exceed 5*l.* and that the same was recoverable in the said Court of Requests. The 12th section of the act enacts, "that if any action or "suit shall be commenced in any other court than the "said Court of Requests for any debt not exceeding 5*l.* "and recoverable by virtue of the recited acts (3 *Jac.* 1. "*c.* 15. and 14 *Geo.* 2. *c.* 10.), and of this act or any of "them in the said Court of Requests, in every such case "the plaintiff in such action or suit shall not, by reason "of a verdict for him, or otherwise, have or be entitled "to any costs whatsoever." The 11th section provides, "that this act or any thing herein contained shall not "extend to any debt where any title of freehold, &c. "shall come in question, or to any debt by specialty, "&c. nor to any other debt that shall arise by reason "of any cause concerning testament or matrimony, *or* "*any thing concerning or properly belonging to the ecclesiasti-* "*cal court*, albeit the same respectively shall not exceed "5*l.*" &c.

Wigley shewed cause, and relied principally on the ground that this, being a demand in respect of tithe, came within the exception of the 11th section as "*a thing concerning or properly belonging to the ecclesiastical court*," and therefore not within the jurisdiction of the Court of Requests. It is enough under these words that the *subject matter* of the action is one that *concerns* or *properly belongs to* the ecclesiastical court; it is not necessary that the suit or action should specifically and in form be brought for the thing. Now here the action is in substance for the *single value of the tithe*, the jurisdiction of which properly

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belongs to that court. The verdict was taken upon a count upon an implied aſſumpſit for the value of the tithe, eſtimated indeed by the rate of the former compoſition, which was then in diſpute; conſidering it as an agreement by the vicar to let the defendant have the tithe, without ſpecifying at what value. The title to the tithe and freehold might have come in queſtion in ſuch an action; which would be enough to ouſt the juriſdiction of the Court of Requeſts, according to *Woolley* v. *Cloutman* (*a*), though the action there was on an implied aſſumpſit for uſe and occupation.

Marryat, in ſupport of the rule, ſaid, that it was clear from the bill of particulars, that the original demand was under 5*l.*, and that juriſdiction was given to the *London* Court of Requeſts over all cauſes not particularly excepted. That the title to the freehold could not have come in queſtion; for unleſs a *contract* had been proved, the value of the tithe could not have been recovered in aſſumpſit. Then the action cannot be ſaid to have been brought for any thing which *concerned or properly belonged to* the eccleſiaſtical court; for the plaintiff could not have ſued there on this contract.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. This was a motion for leave to enter a ſuggeſtion on the roll to exclude the plaintiff, (who had obtained a verdict in an action in this court, eſtabliſhing on his part an original demand of leſs than 5*l.*, and reduced by a tender to 7*s.* 6*d.*) from his coſts, under ſtat. 39 & 40 *Geo.* 3. *c.* 104. on the ground of the defend-

(*a*) *Dougl.* 244.

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ant's being reſident and liable to be ſummoned within the juriſdiction of the Court of Requeſts for the city of *London*; and that the original debt ſued for did not exceed the ſum of 5*l.* The count in aſſumpſit upon which the queſtion ariſes was upon a quantum valebant, for the value of tithes due to the plaintiff, as vicar of *St. Giles, Camberwell*, from certain tenements in the occupation of the defendant, and alleged to have been taken and retained by and at the requeſt of the defendant. The plaintiff reſiſted the motion for leave to enter this ſuggeſtion, upon the ground of the following proviſo contained in the 11th ſect. of the act; viz. "that this act ſhould not extend to any debt "that ſhould ariſe by reaſon of any cauſe concerning "teſtament or matrimony, *or any thing concerning or pro-* "*perly belonging to the eccleſiaſtical court*; albeit the ſame "ſhall not exceed 5*l.*;" conceiving that the ſubject matter of this action was "a thing *concerning or properly* "*belonging to the eccleſiaſtical court.*" But we are of opinion that the ſubject of this action, being the recovery upon a promiſe of an equivalent for tithes retained, is not a thing which can properly be ſaid in its nature *to concern the eccleſiaſtical court* itſelf, in reſpect of the general rights, functions, or ſubjects of juriſdiction of that court, nor a thing which can be ſaid properly to *belong* to it; being neither more nor leſs than a civil contract collateral to the right of tithes, (which the count aſſumes to be admitted,) ſuable properly and peculiarly in a court of law, and which has no further connection with the eccleſiaſtical court than as the general object of ſuit, viz. "*tithes*," is in certain caſes a matter properly cognizable in that court, as it alſo is in other caſes properly cognizable in the courts of law: it cannot therefore be ſaid ſo far "*properly* "*to belong to the eccleſiaſtical court*" as to ouſt the juriſdic-

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tion of the *London* Court of Requeſts in ſums not exceeding 5*l.* within the meaning of that proviſo; and particularly in a caſe, as here, where no right to tithes comes in queſtion. We are therefore of opinion, that as the action in this caſe ſhould have been brought in the Court of Requeſts, the defendant is entitled to make his rule abſolute for entering this ſuggeſtion upon the roll.

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SEAWARD *againſt* WILLOCK.

Under a deviſe "to *A.* for life, "and after him "to his eldeſt or "any other ſon "after him, for "life, and after "them to as "many of his "deſcendants "iſſue male as "ſhall be heirs "of his or their bodies, down "to the 10th generation "during their "natural lives;" held that *A.* took no more than a life eſtate; for here is no *general* intent to create an eſtate tail, as contradiſtinguiſhed from the particular intent to give an eſtate for life to the firſt taker; but a ſingle intent to create a ſucceſſion of life eſtates to perſons not in eſſe, which the law will not allow.

THIS was an action againſt the defendant, an auctioneer, employed by the aſſignees of *Thomas Southcomb*, a bankrupt, in the ſale of an eſtate of the bankrupt by auction, to recover 130*l.*, the depoſit money paid by the plaintiff, who was the higheſt bidder at ſuch auction, with intereſt and coſts. The defendant at the time of the ſale entered into the following undertaking in writing at the foot of the conditions of ſale: "If the title is not "ſatisfactory, the depoſit, intereſt, and coſts to be re-"turned by *John Willock*." The declaration contained a ſpecial count upon this undertaking, and the common counts for money paid, had and received, and on an account ſtated; to which there was a plea of the general iſſue. The cauſe was tried at *Exeter* ſummer aſſizes 1803, before Lord *Alvanley* C. J., when a verdict was found for the plaintiff with damages 200*l.*, ſubject to the opinion of the Court on the following caſe:

On the 23d of *March* 1753, *Lewis Southcomb*, clerk, being ſeiſed in fee of the remainder of the eſtate in queſtion after the determination of the life-eſtate of *George Portbury*, in his will of this date duly executed and atteſted, deviſed as follows: "To my ſon *John* I leave the entire

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entire guardianſhip of *Thomas*, the ſon of my ſon *Thomas Southcomb*, and alſo of my grand-daughter *Elizabeth* his ſiſter. To him the ſaid *Thomas* (*a*) I do give my eſtate of *Holcomb Burnel* (being the eſtate in queſtion) during his natural life, as ſoon as it ſhall fall (*b*); but to his truſtee in his behalf ſhall be committed *the profits* of the ſaid eſtate *until he ſhall arrive at the age of* 21 *years*; and *after him* I do give it *to his eldeſt or any other ſon after him, during his natural life*, and *after them to as many of his deſcendants iſſue male as ſhall be heirs of* HIS *or* THEIR *bodies down to the tenth generation during their natural lives.*" The deviſor died at the end of 1753 or beginning of 1754, leaving his grandſon, the deviſee, his heir at law. *George Portbury* the tenant for life died in 1763; and upon his death the deviſee *Thomas Southcomb* entered into the poſſeſſion of the eſtate, and continued in ſuch poſſeſſion until his bankruptcy as hereinafter mentioned. On the 28th of *November* 1798 a commiſſion of bankrupt iſſued againſt the ſaid *Thomas Southcomb*, who was a trader, was indebted to the petitioning creditor in a ſum ſufficient to ſupport the commiſſion, and had committed an act of bankruptcy; in conſequence of which he was duly declared a bankrupt; and on the 6th of *November* 1802 a bargain and ſale of his real eſtate was duly made to *Jackſon* and *Chamber*, who had been duly choſen aſſignees of his eſtate and effects. On the 9th of *November* 1802 the defendant, by the direction of the aſſignees, put the eſtate up to ſale by auction; and by the conditions the purchaſer was to pay down a depoſit of 10*l.* per cent. and the reſidue on or before *Lady-day* 1803, on having a good title: the conveyance to be at his own expence. The plaintiff was

(*a*) *i. e.* his grandſon *Thomas*.

(*b*) *i. e.* upon the death of *Geo. Portbury*.

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the higheſt bidder, and paid the depoſit; but on the abſtract being delivered, in which it did not appear that the bankrupt was the heir at law of *Lewis Southcomb*, nor was any document ſtated to prove the death of *Geo. Portbury*, which it was inſiſted on by the aſſignees muſt, from the length of time in which he had been ſhewn to be in exiſtence, be preſumed, refuſed to complete the purchaſe; alleging that a good title could not be made; and inſiſted upon a return of the depoſit, &c. on that ground. The bankrupt who, as is before ſtated, was the heir at law of *Lewis Southcomb*, has no children, and is willing to join the aſſignees in any act that ſhall be thought neceſſary to make a good title and conveyance; but neither of theſe circumſtances was ſtated in the abſtract, or communicated to the plaintiff or his attorney until a fortnight before the aſſizes. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover: if the Court ſhould be of opinion that he was, the verdict was to ſtand; if not, the verdict was to be entered for the defendant.

Courtenay, for the plaintiff, after premiſing that in the deciſion of this queſtion the Court would look to no other facts than what were contained in the abſtract of the title delivered to the plaintiff by the vendor, or ſuch at leaſt as were made known to the plaintiff before the action brought; ſtated the queſtion ariſing on the words of the will to be, Whether the deviſee *Thomas Southcomb*, ſince become bankrupt, took an eſtate for life or in tail? (If in tail, he admitted that the bargain and ſale of the commiſſioners would paſs a title to the aſſignees: but not if for life; for the bargain would only operate to paſs that eſtate which the bankrupt lawfully might, and not that which could

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could only be perfected by operating as a forfeiture of his eſtate (*a*).) It is clear, that the teſtator only meant that *Thomas Southcomb* ſhould take an eſtate for life. But it will be argued, that as the general intent of the teſtator was, that all the male deſcendants of *T. S.* ſhould take down to the tenth generation, that can only be effectuated by giving an eſtate in tail male to the firſt taker: but this would be doing violence to the words as well as to the intent of the will; for the eſtate is given after him, not to his iſſue, but to his eldeſt and any other *ſon*; which is a word of purchaſe and not of limitation: and when the teſtator has expreſsly declared that ſuch eldeſt or other ſon of *T. S.* ſhould only take for life, it would be a forced conſtruction to imply from thence a general intent that even the firſt taker ſhould have a greater eſtate. The only words of limitation afterwards uſed, viz. *his* deſcendants *iſſue male* as ſhall be *heirs* of *his* or *their bodies*, from whence any intention to create an eſtate tail can be implied, muſt refer to the *eldeſt* or *other ſon* of *T. S.* And the general intent may be effectuated as far as by law it may, by giving an eſtate for life to the firſt taker, with ſucceſſive remainders in tail to his eldeſt and other ſons as purchaſers. And he referred to *Archer*'s caſe (*b*), *Wyld*'s *caſe* (*c*), *Ginger* v. *White* (*d*), *Goodtitle* v. *Woodhull* (*e*), and *Somerville* v. *Lethbridge* (*f*), the laſt of which came neareſt to the preſent caſe, to ſhew that *T. S.* took only an eſtate for life.

Gaſelee, contrà, ſaid that this was now only a queſtion of coſts; as it was clear that the bankrupt being heir at law of the teſtator, a good title might be made, and that

(*a*) Vide 4 *Leon.* 124. (*b*) 1 *Rep.* 66. (*c*) 6 *Rep.* 16. *b.*
(*d*) *Willes' Rep.* 348. (*e*) *Ib.* 598. (*f*) 6 *Term Rep.* 263.

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equity would compel a ſpecific performance. And that as by the terms of ſale the conveyance was to be made at the expence of the purchaſer, no action lay to recover the depoſit money till tender of ſuch conveyance to the vendor, and his refuſal or inability to execute it: though the vendee might have his remedy in damages for not having the title made to him in due time. [Lord *Ellenborough* C. J. If the title ſhewn be not ſatisfactory, it certainly was not neceſſary for the vendee to do a nugatory act in preparing a conveyance. And the parties could not mean the *latent* title of the vendor, but the apparent title which he exhibited, and upon which only the vendee was required to act.] Then the only queſtion is, whether the vendor had a good title: and that will depend on whether the bankrupt took an eſtate tail under the will: for if he were only tenant for life, the conveyance by bargain and ſale was certainly not ſufficient to enable the aſſignees to convey in purſuance of the agreement. If indeed there had been no bankruptcy, and the bargain and ſale had been made by the bankrupt himſelf, that would have been a forfeiture of his life eſtate, and let in his remainder in fee before the exiſtence of the next taker; but ſuch a conveyance by the commiſſioners to the aſſignees, to which the bankrupt was no party, certainly could not operate as ſuch a forfeiture of his eſtate. The bankrupt however took an eſtate tail. Moſt of the caſes cited were prior to *Robinſon* v. *Robinſon* (*a*), where under a deviſe to *Lancelot Hicks for life and no longer*, he taking the name of *Robinſon*, and after his deceaſe to ſuch *ſon* as he ſhall have taking the name of *Robinſon*, and *for default of ſuch iſſue* then over in fee; *Lancelot Hicks* was holden to take an eſtate tail by implication, notwithſtanding the eſtate for life before expreſsly given to him, in order to

(*a*) 1 *Burr.* 38. and 2 *Veſ.* 225.

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effectuate the manifeſt general intent of the teſtator, that the eſtate ſhould not go over till failure of the iſſue male of *L. H.* In *Somerville* v. *Lethbridge* (*a*) the limitations were not for lives, but for terms of 99 years determinable on lives; there therefore could be no queſtion of an eſtate tail. It is material to conſider that this was a reverſion to be diſpoſed of; and if it were to be conſidered that the firſt taker took only an eſtate for life, if he died in the lifetime of *G. Portbury*, the deviſes over would have failed. For "after *him*" in the firſt place muſt mean *after the bankrupt*, "I do give it to *his* (meaning the bankrupt's) eldeſt ſon, or any *other* ſon *after him*," (muſt mean any other ſon *of the bankrupt after the eldeſt ſon.*) "And after *them*" muſt refer to all the antecedent lives named, viz. the bankrupt, his eldeſt, or any other ſon; "to as many of his (i. e. the bankrupt's) *deſcendants' iſſue male* as ſhall be *heirs* of his (the bankrupt's) *or their* (any of his *deſcendants'*) bodies; down to the tenth generation during their natural lives." The *general* intent therefore was, that *all* the deſcendants, *iſſue male*, of the bankrupt ſhould inherit in ſucceſſion down to the tenth generation, (which muſt mean from the father, and is only another expreſſion for perpetuity;) though the *particular* intention was to give them only eſtates for lives: the only way therefore in which the general intent can legally be effected is by giving the bankrupt an eſtate tail. For if he only took an eſtate for life, and the words, "iſſue male as ſhall be heirs of *his* or their bodies," are to be referred to the iſſue male of the eldeſt ſon, then if the eldeſt ſon took an eſtate of inheritance as a purchaſer after the bankrupt's death, which deſcended to his iſſue, the other ſons of the bankrupt, who could only take if at all next *after* ſuch eldeſt ſon, (after *him*) would be excluded.

(*a*) 6 *Term Rep.* 213.

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Courtenay in reply ſaid, that the defendant's conſtruction rejected the words "*or their bodies*," (his or their bodies) which referred to the eldeſt and other ſons, and read the words "*his body*." And it alſo rejected all the words limiting the eſtates *for the lives* of the ſeveral takers. That if the general intent were to keep the eſtate as long in the family as by law it might, that would better be effected by giving the bankrupt an eſtate for life only, with eſtates tail to his eldeſt and other ſons in ſucceſſion, than by giving him an eſtate tail, which he could immediately defeat.

The Court ſaid, that there could be no doubt that the particular intent was only to give the bankrupt an eſtate for life; and that there could be no difficulty in the conſtruction of the words, unleſs they were to be extended by the ſuppoſed general intent to give him a greater eſtate. They would therefore look into the caſes with that view. And now

Lord ELLENBOROUGH C. J. delivered the judgment of the Court.

On the argument of this caſe it has been contended, on the part of the plaintiff, that the bankrupt, *Thomas Southcomb*, did not take an eſtate tail, but only an eſtate for life under the will of his grandfather *Lewis Southcomb*, clerk, ſtated in the caſe. The clauſe of the will on which the queſtion ariſes is ſhortly and in ſubſtance as follows: "To him the ſaid *Thomas*, ſon of my ſon *Tho-*
"*mas Southcomb*, I do give my eſtate of *Holcomb Burnel*
"(the eſtate in queſtion), during his natural life, as ſoon
"as it ſhall fall; and *after him*, I do give it to his eldeſt
"or any other ſon after him, during his natural life; and
"after them, to as many of his *deſcendants* iſſue male as
"ſhall be heirs of his or their bodies, down to the 10th
"genera-

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" generation, during their natural lives." In order to give *Thomas Southcomb*, the deviſee, an eſtate tail under this deviſe, the counſel for the defendant has contended, that the general intent of the teſtator requires ſuch conſtruction, which muſt therefore be adopted, though contrary to the particular intent, which is to give only an eſtate for life. And that ſuch was the general intent of the teſtator he argues from this, that the teſtator has given the eſtate to the eldeſt or any other ſon of his grandſon; and after them, to as many of his deſcendants iſſue-male as ſhall be heirs of his or their bodies; *thereby meaning that all the ſons and their iſſue ſhould take in ſucceſſion;* whereas if *Thomas Southcomb*, the firſt taker, ſhall take only an eſtate for life, all his ſons, except one, and the iſſue of all ſuch ſons would be excluded. But I do not find any ſuch general intent apparent on this will: on the contrary, the teſtator has expreſsly guarded againſt any implication of ſuch intention, by adding a limitation for life to every ſubſequent eſtate. His meaning clearly was to give eſtates for life only to his grandſon, and after him to his ſons, and after them to their ſons down to the 10th generation; for he has added the words, " during his or their natural lives," to each limitation. But this he could not do by law, inaſmuch as the law will not allow of a *ſucceſſive* limitation of eſtates for life to perſons unborn. Can we then make another will for the teſtator giving to his deviſees different eſtates than thoſe he meant to give to them, becauſe the eſtates he intended cannot by the rules of law take effect? This I conceive would be aſſuming a power which does not belong to us, of turning a legal deviſe into an executory truſt. This deviſe may be read two different ways, according as the expreſſion " *his* deſcendants" be referred to the deſcendants

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ants of *him, Thomas Southcomb*, the firſt taker; or to the deſcendants of his eldeſt or other ſon. Reading it in the way moſt advantageous to the defendant's arguments, it would run thus: "To *Thomas Southcomb* for life, and after him to his eldeſt or any other ſon for life, and after them to as many of *his* (*Thomas Southcomb's*) deſcendants iſſue male as ſhall be heirs of his (*Thomas Southcomb's*) or their (his eldeſt or other ſon's) bodies down to the 10th generation, for life." And ſo reading it, we find no words ſhewing a general intent to give an eſtate-tail in contradiction to the expreſs eſtates for life, ſo preciſely given to each deſcription of perſons who are to take under the will. In *Robinſon* v. *Robinſon*, 1 *Burr.* 38., the deviſe was to *Launcelot Hicks* for life, and no longer; and after his deceaſe to ſuch ſon as he ſhall have; *and for default of ſuch iſſue*, then to the teſtator's couſin in fee. And the Court held that *Launcelot Hicks*, by neceſſary implication, to effectuate the manifeſt general intent of the teſtator, muſt be conſtrued to take an eſtate in tail male. There an eſtate to the heirs male of the body of *Launcelot Hicks* is implied, though an eſtate for life only be given to him; becauſe the teſtator's couſin, *W. Robinſon*, the deviſee over, was not to take till failure of ſuch heirs male. And there, obſerve, *no limitation is added to the eſtates given to the ſon or the iſſue.* So in *Doe* v. *Applin*, 4 *T. R.* 82. the deviſe was to *Wm. Dymock* for life, and after his deceaſe, to and amongſt his iſſue, *and in default of iſſue*, to be divided between the teſtator's nephew and his niece and their heirs for ever. There the intent of the teſtator was manifeſt that his eſtate ſhould not go over to his nephew and niece while there was iſſue of *Wm. Dymock*. In *Doe* d. *Bean* v. *Halley*, 8 *T. R.* 5., the deviſe was to the teſtator's nephew *Michael Halley* for life, and after his deceaſe

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to the eldeſt ſon of his ſaid nephew *Michael Halley* and the heirs of ſuch eldeſt ſon; and in default of iſſue male of his ſaid nephew, to *S. Bean*. The Court, in order to effectuate the teſtator's general intent, determined that *Michael Halley* took an eſtate for life, remainder to his eldeſt ſon in tail, remainder to the father in tail, in order to let in all his iſſue male; the *eſtate not being given over but in default of iſſue male of the ſaid* Michael Halley. And there the Court ſo conſtrued the will as to give *Michael Halley* an eſtate for life only, with remainder in tail to his eldeſt ſon, remainder in tail to the father. In all theſe caſes expreſſions were uſed denoting an intention that the lands ſhould continue in the deſcendants of the firſt taker as long as there were any, without ſpecifying or marking what eſtates ſuch deſcendants ſhould take. But in this caſe the deviſor has not uſed general terms, from whence an intent to give a deſcendible eſtate to the iſſue of the firſt deviſee may be collected; but has in expreſs terms narrowed the eſtates which the iſſue were to take to eſtates for life: and this, properly ſpeaking, is not a caſe of *a particular* and *a general* intent, both of which cannot be effectuated, and where the one muſt give way to the other; but a caſe of *ſingle* intent to create, as I have ſaid, a ſucceſſion of eſtates for life not warranted by law. We do not, therefore, feel ourſelves warranted by any rules of conſtruction to ſay that under this deviſe *Thomas Southcomb*, the bankrupt, took any greater eſtate than for his life. And as it is ſtated that previous to the time fixed by the contract for the payment of the money and completion of the purchaſe, or indeed till near the time of trial, no information was given to the purchaſer that the bankrupt was heir at law of the teſtator, but the title of the aſſignees appears to have been delivered in on the ſup-

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poſition of the bankrupt being tenant in tail, we think that the defendant has failed in making good the agreement on his part; and that thereupon a right of action at law has accrued to the plaintiff. How far the title ſince communicated may in another courſe of proceeding, in another place, render the preſent proceeding abortive; and whether the plaintiff may not be ultimately compelled to fulfil his agreement, is not for us in this action to decide. We are, therefore, of opinion that the poſtea muſt be delivered to the plaintiff.

Friday, May 11th.

The KING *againſt* HARPER.

A charter granted to the *mayor, bailiffs*, and *burgeſſes*, or the greater part of them to chooſe *one of themſelves* to be mayor. but the ſame charter appointed the firſt mayor to continue for a year and until ſome *other burgeſs* ſhould be elected and ſworn, and the two firſt bailiffs to continue until two *other burgeſſes* ſhould be elected and ſworn, and it alſo directed the new mayor to be ſworn in before the *laſt* mayor, *his predeceſſor*, and the bailiffs for the time being, and the burgeſſes preſent; and in like manner the new bailiffs to be ſworn in before the mayor and the *laſt* bailiffs and the burgeſſes preſent. Theſe latter proviſions explain the firſt, and ſhew that the mayor muſt be choſen out of the *burgeſſes* at large, and *not* out of the *bailiffs*; and this avoids any queſtion as to the validity of a *ſwearing in* of an officer before *himſelf* by his name of office.

AN information in nature of a quo warranto was exhibited againſt the defendant for exereiſing the office of mayor of *Liverpool*, in the county of *Lancaſter*; to which he pleaded that King *Charles* I., by his charter of the ſecond year of his reign, reciting that the town of *Liverpool* was an ancient town, and that *the mayor, bailiffs, and burgeſſes* of the town from time immemorial had enjoyed divers liberties, &c. by preſcription, charters, and cuſtom, granted that the *burgeſſes* and their ſucceſſors ſhould be incorporated by the name of the *mayor, bailiffs, and burgeſſes* of the town of *Liverpool*, &c.; and the king further granted to the ſaid *mayor, bailiffs, and burgeſſes*, that there ſhould be *one of the burgeſſes*, in form thereinafter mentioned to be choſen, who ſhould be called *mayor*; and that there ſhould be *two of the ſaid burgeſſes*, in form thereinafter mentioned to be choſen, who ſhould

be

be called *bailiffs*. And that the mayor, bailiffs, and burgeſſes for the time being, or the greater part of them, (of whom the ſaid *mayor* and *one of the bailiffs* for the time being ſhould be two,) ſhould have power to make by-laws. And the king nominated Lord *Strange* to be the firſt mayor, to continue till the feaſt of *St. Luke* then next following, *and until* ſome *other burgeſs* to that office ſhould be elected and ſworn, according to the proviſions after expreſſed; and the king alſo nominated *R. Tarleton* and *J. Southern* to be the two firſt bailiffs, to continue in the ſame offices unto the ſaid feaſt, *and until* two *other of the burgeſſes* to that office ſhould be in due manner choſen and preferred according to the proviſions after expreſſed, if the ſaid *R. T.* and *J. S.* ſhould ſo long live, unleſs in the mean time from that office they, or either of them, ſhould, for reaſonable cauſe, be amoved. And the king further granted to the ſaid mayor, bailiffs, and burgeſſes, that the *mayor, bailiffs, and burgeſſes* aforeſaid for the time being, or *the greater part of them*, from time to time ſhould have power yearly, upon the feaſt of *St. Luke*, to chooſe and nominate *one of themſelves* who ſhould be mayor for one whole year then next following, and that after nomination and before admiſſion to that office, he ſhould *take a corporal oath before the laſt mayor, his predeceſſor, and the bailiffs for the time being*, and the *burgeſſes*, or *ſo many of them as ſhould be then preſent*, to execute his office rightly, &c.; and if during the year the mayor ſhould die or be amoved, the aforeſaid *bailiffs and burgeſſes*, or the greater part of them for the time being, *one other of themſelves* into the office of mayor might chooſe, &c. for the reſidue of the year, having firſt taken a corporal oath in form aforeſaid. The king further granted that the ſaid *mayor, bailiffs, and burgeſſes*, yearly, on the feaſt

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of *St. Luke*, ſhould chooſe and name *two of themſelves* who ſhould be bailiffs for the year enſuing, and that after ſuch election, and before admiſſion to that office, they ſhould take a corporal *oath before the mayor and* LAST *bailiff* (*a*) for the time being, and the *burgeſſes*, or ſo many of them as ſhould be then preſent, to execute that office juſtly, &c. for one year next enſuing, unleſs in the mean time, for reaſonable cauſe, by the *mayor and burgeſſes* of the ſaid town, or the greater part of them, they or either of them ſhould be amoved. And in caſe of the death or amotion of the bailiffs, or either of them, within the year, it ſhould be lawful for the ſaid *mayor and burgeſſes* for the time being, or the greater part of them, *one other or two others of themſelves* bailiff or bailiffs to chooſe, &c. The plea then ſtated the acceptance of that charter: and ſet forth another charter, granted in the 7 *Will.* 3., which ratified the former charter: and, in order to do away doubts which had ariſen by an unauthorized acceptance (without ſurrender of the former) of another charter in the 29 *Car.* 2., by which material changes in the government of the town had been introduced, the charter of King *William* gave the corporation a common council of 41 of the burgeſſes, of which 41, one ſhould be called *mayor*, and two ſhould be called bailiffs of the town. The charter then named *T. Johnſon* to be the firſt and modern mayor, to continue in office until the feaſt of *St. Luke*, and until *ſome other of the burgeſſes* to that office ſhould be

Charter of *W.* 3.

(*a*) The original charter had here the word *bailiff* in the ſingular number, and ſome argument was at firſt attempted to be drawn from this by the defendant's counſel, in favour of the ſuppoſition that the caſe might have been contemplated of an election of one of the bailiffs to be mayor: but this was waved on an intimation by the Court that the word was probably put in the ſingular by miſtake, as otherwiſe the word *laſt* (laſt bailiff), as applied to bailiff in the ſingular number, was inſenſible.

duly

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duly appointed and ſworn, according to the proviſions of the charter of 2 *Car.* 1., and nominated *R. Norris* and *L. Hewſton* to be the two firſt and modern bailiffs, to continue until the feaſt of *St. Luke, and until ſome other two of the burgeſſes* ſhould be elected and ſworn, according to the charter of *Car.* 1. The king further granted that the mayor, bailiffs, and burgeſſes for the time being, or any twenty-five of them aſſembled (of whom the mayor and *one* of the bailiffs for the time being to be two) ſhould be a common council, to execute all things, &c. And that if any the mayor, recorder, common clerk, or ſome or any of the bailiffs of the common council ſhould die, or from his office be amoved, depart, or refuſe to ſtand, another fit perſon into his office, &c. ſhould be elected and ſworn in manner as accuſtomed before the charter of the 29th *Car.* 2. The plea then ſtated the acceptance of the charter of King *William*, and averred that the election of mayor, recorder, common clerk, bailiffs, &c. was, before the charter of *Car.* 2., uſed and accuſtomed to be had in the manner and by the perſons preſcribed by the charter of *Charles* I. The plea then ſtated that on the feaſt of *St. Luke*, 18th *October* 43 *G.* 3. *J. Bold* being then mayor, and the defendant and *J. Brooks* then being bailiffs, aſſembled together with the burgeſſes, at the *Exchange* in the town, for the purpoſe of electing a mayor and bailiffs; and that at the ſaid aſſembly he, the defendant, *(ſo being one of the bailiffs)* and alſo a member of the common council, was then and there, *by the ſaid mayor, bailiffs, and burgeſſes* ſo aſſembled for the purpoſe aforeſaid, in due manner *elected to be mayor* for the year enſuing, and thereupon did then and there, and before he took upon himſelf to exerciſe the ſaid office of

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mayor, and before any election had been made of bailiffs for the year next enſuing, *take his corporal oath before* J. Bold *the then laſt mayor, his predeceſſor*, and before the ſaid *J. Brooks and himſelf* the defendant, *being the bailiffs for the time being*, and before divers *burgeſſes* then and there alſo preſent at the ſaid aſſembly, rightly to execute the ſaid office of mayor, &c., and thereupon the defendant was then and there duly ſworn and admitted into the ſaid office of mayor, &c.; and ſo the defendant juſtified the uſer of the office. To this plea there was a general demurrer and joinder.

J. Clarke, in ſupport of the demurrer, contended that the defendant, who at the time of his election was one of the bailiffs, was ineligible to the office of mayor on three grounds: 1ſt, On the words of the charters. 2. By reaſon of the duties caſt on him as bailiff, which until diſcharged diſabled him from being mayor. 3. Becauſe, according to the terms of the charters he could not properly be ſworn in. 1ſt, The corporation conſiſts of one mayor, two bailiffs, and an indefinite number of burgeſſes. The charter of *Car.* 1. grants to the mayor, bailiffs, and burgeſſes, that one of the *burgeſſes* ſhall be choſen mayor. The word *burgeſſes*, though in itſelf a general term, is there uſed in contradiſtinction to *mayor* and *bailiffs*. The firſt mayor was appointed until ſome other *burgeſs* ſhould be elected and ſworn: and the two firſt bailiffs were appointed until two other *burgeſſes* ſhould be choſen. If the queſtion aroſe merely on theſe words there could be no doubt: but the ſubſequent words will be relied on touching the election of the mayor, where power is given to the *mayor, bailiffs, and burgeſſes*, or the greater part of

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them, to chooſe yearly one of *themſelves* to be mayor; which relative, *themſelves*, will be contended to include all the antecedent parts of the corporation, *mayor*, *bailiffs*, *and burgeſſes*. But this conſtruction will not agree with what follows; and to make the word *themſelves* conſiſtent with the other parts of the charter, it muſt be reſtrained to the laſt immediate antecedent, namely, *burgeſſes*; for the mayor elect is to take the oath of office before *the laſt mayor his predeceſſor*, and *the bailiffs for the time being*. Of neceſſity therefore thoſe, before whom the newly elected officer is to be ſworn, muſt be excluded from the perſons eligible. And unleſs this be the conſtruction, the old mayor would be as eligible to the ſame office again as the old bailiffs, which is excluded by the expreſs terms of the charter providing that the new mayor ſhall be ſworn before the *laſt* mayor *his predeceſſor*; for a man cannot be the *predeceſſor* to himſelf; neither can he at one and the ſame moment repreſent the *laſt* and the *preſent* mayor in a ſcene where the two are required to be preſent. It is a ſettled rule in the expoſition of deeds, that all the parts of an inſtrument ſhall be ſo conſtrued as to ſtand with each other, if poſſible. *Shep. Touch. c.* 5. *p.* 84. *pl.* 4, 5. And this conſtruction is fortified by the ſubſequent charter of *Will.* 3. which directs the mayor to *continue in office* until ſome other of the *burgeſſes* ſhould be "duly appointed *and ſworn* according to the charter of *Car.* 1." 2dly, The bailiffs have certain duties to perform on the day of election of mayor, which render them reſpectively incompetent to be elected to that office. It is to be obſerved that the defendant was elected mayor before any other election of new bailiffs took place; ſo that he was ſtill in office as bailiff at the time of his election to be mayor.

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The new mayor is to be elected by the *mayor, bailiffs, and burgeſſes*; ſo that the attendance of the *bailiffs*, as an integral part, was neceſſary to form an elective aſſembly, and to the perfection of the election; and every definite integral part muſt attend by a majority at leaſt of its number. *Reg.* v. *Lock*, *M.* 6 *Ann.* (*a*), *Rex* v. *Bellringer* (*b*), *R.* v. *Miller* (*c*), and *R.* v. *Morris* (*d*). But when one of the bailiffs was choſen mayor there ceaſed to be a majority of the bailiffs exiſting, ſo that no other corporate aſſembly could be holden to fill up the vacancy. And therefore the Court will not put a conſtruction on the charter which would tend to a diſſolution of the corporation. 3dly, The new mayor is to be ſworn in before his predeceſſor in office, *and the bailiffs for the time being*: but as the defendant would continue bailiff till he was ſworn in, he muſt neceſſarily be ſworn in *before himſelf*, which is incongruous and abſurd. He cannot act in the double capacity of the perſon ſworn in, and one of the perſons before whom he is to be ſworn in. That queſtion incidentally aroſe in *Rex* v. *Malden* (*e*); but it was not neceſſary to determine it, as the Court thought that at all events the ſwearing in under the ſtat. 11 *Geo.* 1. *c.* 4. muſt be before the preſiding officer; and the defendant, who had been elected to the office of bailiff of *Malden* at a corporate aſſembly at which he himſelf preſided, having been ſworn in before the three next in place and office to himſelf, ſuch ſwearing in was holden bad under the ſtatute. This is not an objection of form merely, but of ſubſtance, growing out of the words of the charter itſelf. The object of requiring the oath of office to be taken before certain perſons

(*a*) 6 *Vin. Abr.* 269. (*b*) 4 *Term Rep.* 810. (*c*) 6 *Term Rep.* 268.
(*d*) 4 *Eaſt*, 17. (*e*) 4 *Burr.* 2130.

is,

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is, that they may atteſt the ſolemnity of the pledge. An affidavit ſworn by a commiſſioner before himſelf would not be received for defect of the atteſtation that the oath had been properly adminiſtered and taken. [*Lawrence* J. Does the charter in this reſpect mean more than that the oath ſhall be taken before the ſame aſſembly by whom the election is made? The ſame objection, if puſhed to the extreme, might be ſaid to apply to the election even of a *burgeſs*; becauſe the oath is to be taken not only before the laſt mayor and bailiffs for the time being, but alſo before the burgeſſes who attend, of which deſcription the party himſelf would be one.] He then referred to *R.* v. *Tucker* (*a*), where the word *burgeſſes*, out of whom the mayor of *Weymouth* was to be choſen, received a limited conſtruction, as excluding *aldermen*, though they were in a general ſenſe *burgeſſes*.

Lambe for the defendant. Firſt, as to the ſuppoſed ineligibility of a bailiff to be elected mayor, from the words of the charter, the material clauſe is that which directly profeſſes to regulate the election of mayor, and that expreſsly directs the mayor, bailiffs, and burgeſſes, or the greater part of them, to chuſe *one of themſelves* to be mayor; which, in the grammatical and legal conſtruction of the whole clauſe taken together, muſt refer to the mayor, bailiffs, and burgeſſes. The relative muſt refer to the whole antecedent ſentence, and not to the laſt member of it. The choice is to be made by the collective branches of the corporation, or "the greater part of *them*," out of *themſelves*. The word *them* cannot refer merely to burgeſſes, becauſe an election by the burgeſſes

(*a*) 4 *Bro. Parl Caſ.* 455.

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alone without the attendance of the mayor and bailiffs would certainly not be good. Then the word *themſelves* cannot be taken in a more limited ſenſe than the word *them* which precedes it. In *R.* v. *Morris* (*a*), where the election of mayor was to be made by a majority of the ſeveral integral definite parts of the corporation and other burgeſſes and inhabitants *for the time being*, Lord *Ellenborough* ſaid, that no grammatical conſtruction would admit that the words *for the time being* ſhould refer merely to *inhabitants* as the antecedent laſt named: they muſt certainly refer to all the conſtituent parts of the corporation before named. Then the clauſe is relied on, appointing the firſt mayor to hold over until ſome *other burgeſs* ſhall be appointed. But that expreſſion does not occur in any other part of the charter. And after the firſt appointment of officers all ſucceeding bailiffs would neceſſarily be burgeſſes, and would not ceaſe to be ſuch by becoming bailiffs. And none but the firſt named officers were to hold over till their ſucceſſors were appointed. The natural courſe of coming into office would be firſt as a burgeſs, then as a bailiff, and then as mayor. To ſay that a bailiff is incligible to be mayor is to require a retrograde motion. The caſe of *R.* v. *Tucker* (*b*) is very diſtinguiſhable; for there the direction was that the mayor and aldermen ſhould name, not one of *themſelves*, but four of the *burgeſſes and inhabitants*, out of which number the whole body were to chooſe a mayor. So that *burgeſſes* was there put in contradiſtinction to the *mayor and aldermen*. 2dly, As to the incompatibility of the offices of mayor and bailiff; that objection only applies where the ſame perſon holds the two offices at the ſame

(*a*) 4 *Eaſt*, 17—26. (*b*) 4 *Bro. Parl. Caſ.* 455.

time;

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time; but here the defendant ceaſed to be bailiff at the inſtant he became mayor. And he continued bailiff until his appointment as mayor was perfected by ſwearing in. Therefore the ſwearing in was before the ſeveral integral parts of the corporation, ſuppoſing it to be neceſſary that both the bailiffs ſhould attend; which is not certain; for in the clauſe for making by-laws, one of the moſt eſſential powers of the corporation, the attendance of one bailiff only is required. And the oath of the new bailiffs is required to be taken before the "laſt *bailiff*," (*a*) which ſhews that the charter contemplated that one of the bailiffs might be elected mayor. 3dly, As to the ſwearing in, conſidering the nature of theſe promiſſory oaths of office, which are not like judicial oaths puniſhable for the breach of them by an indictment for perjury, being merely binding on the conſcience of the officer, there is no incongruity in his taking it (as it is called) before himſelf. The Judges of the ſuperior courts take the oath of office before themſelves and each other. So of other officers. The word *before* means no more than *in the preſence of*, and does not imply that the oath is *adminiſtered by* thoſe *before* whom it is to be taken *to* the officer taking it; but he *takes* it in their preſence. However, if there were any objection on that ground, it may eaſily be obviated by firſt chooſing one of the old bailiffs to be the new mayor, who continues bailiff till ſworn in, and then chooſing the two new bailiffs, who may immediately be ſworn in before the old mayor and old bailiffs, and then the new mayor will be ſworn in before the laſt mayor, as the charter requires, and the new bailiffs, who will then be in office.

(*a*) *Vide* note (*a*) p. 210.

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J. Clarke, in reply. It is admitted that the ſecond mayor, that is the firſt *elected* mayor, muſt have been a *burgeſs*; then that gave a rule for all future elections. The only clauſe relied on by the defendants is that the election of mayor is to be made by the *mayor, bailiffs, and burgeſſes* out of *themſelves*, which by the defendant's conſtruction muſt include the *mayor* as well as the bailiffs, if it include either: but it cannot include the mayor; becauſe the new mayor is to take the oath of office before "the *laſt* mayor, *his predeceſſor*;" then the predeceſſor muſt neceſſarily be excluded. Therefore the word *themſelves*, as it cannot include *all* thoſe before named, can only refer to *burgeſſes*, which is the laſt antecedent. And the excluſion of the bailiffs will make all the different parts of the charter harmonize, and avoid that inverted mode of election and ſwearing in which is the only expedient offered for avoiding incongruity, and ſuch as could not have been contemplated by the framers of the charter. The oath too is to be taken before the *laſt* mayor and *the bailiffs for the time being*. The word *laſt* is there applied to the mayor, becauſe the perſon to be ſworn in is the *new mayor*. And for the ſame reaſon the *new bailiffs* are to be ſworn in before *the mayor* and the *laſt bailiffs*. There is no inſtance before this of a bailiff having been elected mayor.

Lord ELLENBOROUGH C. J., after the argument, ſaid that the Court would look more particularly into the charters before they delivered their opinion; though it appeared to him very difficult to ſuſtain the defendant's election by the expedient which had been ſuggeſted. And now his Lordſhip delivered the judgment of the

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Court. (After ſtating the mode of election of the mayor and bailiffs as preſcribed by the charter of *Car.* 1., and the manner in which the defendant was in fact elected mayor.)

It appears to us reaſonable to adopt that conſtruction of the charter which is moſt agreeable to the natural order and courſe of proceedings obſerved in ſuch elections, and which will prevent all difficulties, rather than that, which, unleſs ſome degree of management and contrivance is reſorted to, would make it impoſſible to elect other officers: and particularly where the charter, as here, expreſsly directs that the firſt mayor ſhould continue till ſome *other* burgeſs ſhould be elected into that office, and the firſt bailiffs in like manner ſhould continue till two *other* of the burgeſſes ſhould be choſen to that office: thereby importing an excluſion of the *ſame* mayor and burgeſſes from being again immediately elected into the *ſame offices* at leaſt. If the new mayor and bailiffs be elected from the *burgeſſes* only, excluſive of *the old mayor and bailiffs*, (and the mode preſcribed by the charter of ſwearing in the mayor *coram predeceſſore* clearly ſhews that the word *burgeſſes* muſt be narrowed in conſtruction to ſome extent, and ſo as to exclude the preceding mayor at leaſt,) it will then be immaterial which deſcription of officers is ſworn in firſt. For till the new mayor is ſworn in, his predeceſſor will continue in office, at leaſt for the whole of that day: and till the new bailiffs are ſworn in, their predeceſſors alſo will be in office. So that if the mayor be ſworn in laſt, he will be ſworn before his predeceſſor and the bailiffs; and though ſuch bailiffs be the new ones, it will nevertheleſs ſatisfy the terms of the charter: and though the bailiffs are ſworn in firſt, they

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will be ſworn before the *old mayor*, (which will ſatisfy the words of the charter,) and their predeceſſors the laſt bailiffs. This conſtruction would alſo prevent any queſtion as to the validity of a ſwearing in of the mayor *before himſelf*, ſuppoſing the words of the charter, inſtead of requiring as it has done a ſwearing in before the whole aſſembly, one of whom of courſe muſt be the perſon to be ſworn, had limited the ſwearing to be before a part of the aſſembly, as for inſtance, the mayor and bailiffs. We are of opinion, therefore, that this conſtruction is the proper one to be put upon the terms of this charter, and that of courſe the election ſtated in the defendant's plea not being conformable thereto, was not well made; and therefore that there muſt in this caſe be judgment of ouſter againſt the defendant.

Judgment of Ouſter.

The KING *againſt* DE MANNEVILLE.

Saturday, May 12th.

The father of a child is entitled to the cuſtody of it, though an infant at the breaſt of its mother: if the Court ſee no ground to impute any motive to the father injurious to the health or liberty of ſuch a child, as by ſending it out of the kingdom; the father being at the time an *alien enemy* domiciled in this kingdom, and the mother being an *Engliſhwoman*, and *apprehenſive* only that he meant to ſend the child abroad, but aſſigning no ſufficient reaſon for ſuch her apprehenſion.

AT the beginning of this term a writ of habeas corpus was obtained, directed to the defendant, to bring up the body of an infant of eight months old, the defendant's daughter, upon an affidavit from the mother and her friends that the defendant, who was a *Frenchman*, had married the mother of the child, an *Engliſhwoman*, by whom he had this only child. That ſhe not long after their marriage had ſeparated herſelf from him on account, as ſhe alleged, of ill treatment, and kept the child whom ſhe was nurſing with her. That on the night of the 10th of *April* laſt the defendant found means, by force and ſtratagem, to get into the houſe where ſhe was, and had forcibly taken the child then at the breaſt, and carried it away almoſt naked in an open carriage in inclement weather; with a view, as the mother apprehended, of taking it out of the kingdom. However, when this part of the affidavit was afterwards more particularly referred to, it appeared that the only ground for ſuch apprehenſion of the mother was, that the defendant had threatened to carry away the mother to a diſtance from her friends, and afterwards had threatened to take away the child from her, and ſhe was *apprehenſive* that he meant to carry it *to ſome remote part of the kingdom or to* France.

Topping now (after the return read, and the child being ready to be produced in court when called for) ſaid, that he had affidavits in anſwer, which he would wave reading, if not neceſſary, to prevent widening the breach between the

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the parents. But he contended that the father was by law entitled to the cuſtody of his child; and that the only ground upon which the Court had granted the writ, namely, on the ſuppoſition that the father had threatened or had otherwiſe given reaſon to believe that he meant to ſend the child out of the kingdom, was removed upon referring more accurately to the terms in which that part of the mother's affidavit was ſworn. And he referred to the caſe of Mr. *Lytton*, which came before this Court on an application for a habeas corpus in 1781 by the mother to bring up the body of a child who had been placed at ſchool, from whence it had been taken by the father. In that caſe there had been articles of ſeparation, by which the father had bound himſelf to let the mother have acceſs to the child. And there Lord *Mansfield* ſaid, that the Court could not at any age take a child from the father. But that as he had conſtrained himſelf by the articles to let the mother have acceſs to the child, if he choſe to take the child home, he muſt provide for the acceſs of the mother to it there.

Lord ELLENBOROUGH C. J. obſerved, that as the ground of removal out of the kingdom was done away, it lay on thoſe who applied for the writ to ſhew that the father was not entitled to the cuſtody of the child.

Erſkine, *Garrow*, and *Gibbs*, then ſuggeſted that the father was now *an alien enemy*, and therefore the apprehenſion of the mother that he might carry the child out of the kingdom was not unreaſonable, eſpecially as he was liable himſelf to be ſent out of the kingdom under the alien act at a moment's warning. That the child

being

being born of an *Engliſh* mother here was entitled to the protection of the laws, and ought not to be expoſed to the ſmalleſt riſk of being removed. That it is of very tender age, and conſidering that its removal from the mother deprived it of its accuſtomed proper nutriment was an additional reaſon for reſtoring it to her poſſeſſion, particularly when the father had obtained poſſeſſion of it by force and ſtratagem, and in a manner ſo dangerous to it.

Lord ELLENBOROUGH C. J. (ſtopping *Topping*, who wiſhed to have his affidavits upon the merits read). We draw no inferences to the diſadvantage of the father. But he is the perſon entitled by law to the cuſtody of his child. If he abuſe that right to the detriment of the child, the Court will protect the child. But there is no pretence that the child has been injured for want of nurture, or in any other reſpect. Then he having a legal right to the cuſtody of his child, and not having abuſed that right, is entitled to have it reſtored to him.

LAWRENCE J. Since Mr. *Lytton*'s caſe, there was another of the ſame ſort upon an application of Sir *W. Murray* to obtain poſſeſſion of a child of five years old, which the mother kept from him. Lord *Kenyon* had no doubt but that the father was entitled to have the cuſtody of the infant, unleſs the Court ſaw reaſon to believe that he intended to abuſe his right by ſacrificing the child, which was ſuggeſted to be his motive for getting poſſeſſion of it. In that caſe Sir *W. Murray* had been divorced from the mother, and there was not, as it was alleged, any reaſon to think the child his, though born before the divorce.

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If the putative father of a baſtard child obtain poſſeſſion of it by force or fraud, the Court will order it to be reſtored on the application of the mother.

divorce. But the Court did not think that a ſufficient ground to deny him the cuſtody of it.

Per Curiam, Let the child be remanded to the cuſtody of the father (*a*).

(*a*) REX *againſt* MOSELEY.

Mingay moved for a writ of habeas corpus to the defendant, to bring up the body of a baſtard child of five years old, which a young woman had had by the defendant, and he cited *Rex* v. *Soper*, 5 *Term Rep.* 278., as in point; where it was holden that the putative father had no right to the cuſtody of the child.

Lord KENYON C. J. Take a rule. Where the father has the cuſtody of the child fairly, I do not know that this Court would take it away from him; though I do not mean to impeach the propriety of the caſe cited. But where he has got poſſeſſion of the child by force or fraud, as is here ſuggeſted, we will interfere to put matters in the ſame ſituation as before. Rule granted.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

1804.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Forty-fourth Year of the Reign of GEORGE III.

OSBORNE and AMPHLETT *againſt* HARPER.

Saturday, June 2d.

THE plaintiffs brought aſſumpſit for money paid, money lent and advanced, &c. in order to recover a ſum of 1156*l.* paid by them to one *J. Spooner*, in conſequence of a judgment obtained by *Spooner* in a joint action againſt the plaintiffs and the defendant. At the trial before *Rooke* J. at the laſt *Warwick* aſſizes, the record of the former action was proved, whereby it appeared that it was an action brought by *Spooner* on certain bills of exchange drawn in his favour by *Harper* and Co., (*i.e.* the defendant and the preſent plaintiffs in this action,)

A., *B.*, & *C.* having diſſolved partnerſhip, *C.*, after ſuch diſſolution, drew bills in the partnerſhip firm in favour of *D.*, he not knowing of ſuch diſſolution, upon which *D.* brought his action againſt all the former partners, and *C.* having pleaded his bankruptcy, *D.* entered a noli

profequi as to him, and recovered judgment againſt *A.* and *B.*, which was afterwards ſatisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the reſt of the money on their *joint* credit: held that the ſum *ſo paid* in ſatisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* againſt *C.*

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to which action non aſſumpſit was pleaded; and the defendant *Harper* further pleaded his bankruptcy, againſt whom the plaintiff *Spooner* entered a noli proſequi, and proceeded againſt the preſent plaintiffs, and recovered judgment, and ſued out execution againſt them for 1156*l.* It further appeared by the evidence of the attorney for the defendants in that action, that the bills of exchange on which the recovery was had were drawn in the year 1802, by *Harper* the defendant, in the names of *Harper* and Co., and that on that trial *Harper* himſelf, being called as a witneſs, had ſworn that the partnerſhip between him and the preſent plaintiffs commenced in 1795, and in *October* 1796 was entirely diſſolved, ſince which time there had been no partnerſhip dealings between them; nor, as appeared by other evidence, between the preſent plaintiffs. That the queſtion in the former cauſe was, Whether *Spooner* had any knowledge of the diſſolution of the partnerſhip before the bills were given? and the fact of ſuch knowledge not appearing to the jury, they found a verdict for *Spooner* againſt the preſent plaintiffs. The attorney further proved that he had diſcharged the whole demand *at the requeſt of the preſent plaintiffs.* Upon this evidence it was contended at the trial that the plaintiffs could not maintain a *joint* action againſt the defendant, but each ought to have brought a ſeparate action for his moiety of the damages paid. The learned Judge, however, over-ruled the objection, and directed a verdict for the plaintiff, with liberty to the defendant to move to ſet aſide the verdict and enter a nonſuit if the Court ſhould be of a different opinion. A rule niſi was obtained for that purpoſe in the laſt term, againſt which

Wood, *Clarke*, and *Reader*, now ſhewed cauſe, and contended that the plaintiffs might well maintain this *joint* action

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action againſt their former partner, for whom they had paid this money in conſequence of his own act and default after the diſſolution of their former partnerſhip; 1ſt, becauſe the plaintiffs were ſued in the former action *as partners*, and the money was recovered againſt them upon a *joint* judgment, under which each was liable to have had the whole damages levied upon him; and therefore whatever was paid by either was paid *for both*. 2dly, At all events, as the money was paid by the attorney *at the requeſt of the preſent plaintiffs*, it muſt be conſidered as advanced on their *joint* credit, and therefore conſtituted a *joint* fund. And they cited *Thompſon*'s caſe (*a*), *Ward and Others* v. *Brampſton* (*b*), and *Graham and Others* v. *Robertſon* (*c*): and anſwered the caſe of *Brand and Herbert* v. *Boulcott* (*d*), (which was ſuggeſted è contrà) by obſerving, that it was there expreſsly ſtated that the two aſſignees of a bankrupt, who had joined in bringing the action againſt a third aſſignee for his proportion of a ſolicitor's bill who had been employed as ſuch by the three, had *each* (*i. e.* of the two plaintiffs) *paid half the bill*; that, therefore, was taken to be a payment by each of the plaintiffs of a certain ſum out of his own ſeparate funds, and not out of or in reſpect of any *joint* fund or credit, and conſequently they could not join in the action.

Vaughan Serjt., in ſupport of the rule, relied upon the caſes of *Graham and Others* v. *Robertſon*, and *Brand and Herbert* v. *Boulcott*, before cited, as in point for the defendant. In the former, the plaintiffs, together with *A.* and *B.*, being owners of one privateer and the defendant of another, a prize was taken, condemned, and ſhared by

(*a*) *Noy*, 130. (*b*) 3 *Lev.* 362.
(*c*) 2 *Term Rep.* 282. (*d*) 3 *Beſ & Pul.* 235.

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agreement between the owners of the two ſhips; and ſentence of condemnation having been afterwards reverſed, reſtitution with coſts was awarded, which was paid ſolely by the plaintiffs; their co-partners, *A.* and *B.*, having in the mean time become bankrupts. And it was holden that the plaintiffs could not maintain the action againſt the defendant for a moiety of the ſum ſo paid; for either it was a partnerſhip tranſaction, when *A.* and *B.* ought to have been joined; or otherwiſe it ſtood as a ſeparate payment by each individual, and each ſhould have brought a ſeparate action for what he actually advanced. So here the partnerſhip having been put an end to, there was no joint fund belonging to the plaintiffs out of which the damages could have been paid, but what was paid by each towards them muſt have been taken out of his own pocket. If after payment of the damages one of the plaintiffs had died, the remedy would not have ſurvived to the other as in the caſe of partners.

The Court expreſſed great doubt upon the queſtion when it was diſcuſſed at the bar, and ſuggeſted ſeveral difficulties for the attention of the plaintiffs' counſel in the courſe of their argument; but that which weighed moſt ſtrongly with them was that it did not appear in point of fact that the damages in the former action had been paid out of any *joint* ſtock or fund, without which they conſidered that a *joint* action for repayment of the ſum advanced by the plaintiffs for the uſe of the defendant could not be ſupported. For without a *joint fund* out of which the payment was to be made there could be no *joint payment.*

Lord ELLENBOROUGH C. J. at laſt obſerved upon the evidence given by the attorney for the plaintiffs, "that he had

had 'diſcharged the whole demand at the requeſt of the preſent plaintiffs:" which, he ſaid, ſeemed to convey the idea that the plaintiffs had borrowed the money *jointly* of their attorney for the purpoſe of paying the damages, and then it might be conſidered as a *joint* payment by them, out of which a *joint* cauſe of action would accrue. But if each of the plaintiffs contributed his ſhare of the money put into the attorney's hands for the purpoſe of ſatisfying the damages, that would not conſtitute a joint demand againſt the defendant, but each muſt ſue ſeparately for his particular advance.

The Court therefore finally directed that the plaintiffs' attorney ſhould make an affidavit, ſtating particularly in what manner the money paid by him had been obtained; whether he had paid it out of his own pocket upon the *joint* credit of the plaintiffs, making them *jointly* liable to him for the whole; or whether each of the plaintiffs had in the firſt inſtance contributed ſo much of their own money, with which he had afterwards made the payment. And they obſerved that it was neceſſary to have the fact ſtated with more preciſion than it appeared upon the report, as the caſe would furniſh a material precedent in future.

On a ſubſequent day in the term the affidavit required was produced, ſtating that the plaintiffs' attorney had advanced 500*l.* on the *joint credit* of the plaintiffs, and had borrowed the remainder upon their *joint note*, with which he had diſcharged the execution.

Lord ELLENBOROUGH C. J. then ſaid that that created a *joint* fund for the diſcharge of the execution, and conſequently

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ſequently the plaintiffs were entitled to maintain a *joint* action for the repayment of the money ſo advanced.

Per Curiam, Rule diſcharged.

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Acceptance of a leſs cannot be a ſatisfaction in law of a greater ſum then due: nor can it operate as an extinguiſhment of the original cauſe of action, though accompanied by a conditional promiſe to pay the reſidue when of ability.

THIS was an action of indebitatus aſſumpſit for goods ſold and delivered. Plea, non aſſumpſit. At the trial before *Heath* J. at the laſt *Chelmsford* aſſizes it was proved that the defendant was, prior to his inſolvency, indebted to the plaintiff in 50*l.* for goods ſold and delivered. That in conſequence of his inſolvency the defendant compounded with all his creditors, and paid them 7*s.* in the pound, and at the time of ſuch payment to the plaintiff promiſed him to pay him the reſidue of his debt when he ſhould be of ability ſo to do; which he was proved to have been before the action brought. On the other hand, the defendant produced a receipt ſigned by the plaintiff, and dated 29th of *March* 1802, for a compoſition of 7*s.* in the pound for his debt of 50*l.*, which he acknowledged to be in full of all claims and demands from the beginning of the world to that day: which receipt it was inſiſted was either a diſcharge of the promiſe, or otherwiſe that the promiſe itſelf was void, as having been made in fraud of the other creditors. But the plaintiff's counſel contended that the acceptance by a creditor of a leſs ſum in ſatisfaction of a greater was no diſcharge of the debt, unleſs it were by deed; and they relied on the caſe of *Heathcote* v. *Crookſhanks* (*a*). The learned Judge however, not having the caſe before him, directed the jury to find for the defendant, and ſaved the point for

(*a*) 2 *Term Rep.* 24.

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the plaintiff, if the authority ſhould be found to ſupport him. A rule niſi was accordingly obtained by *Shepherd* Serjt. for ſetting aſide the verdict, and having a new trial; againſt which

Beſt Serjt. now ſhewed cauſe, and admitting that accord without ſatisfaction was no defence to an antecedent demand, endeavoured to diſtinguiſh this from the caſe of *Heathcote* v. *Crookſhanks*, becauſe there the compoſition agreed to be taken at one time by the creditor was afterwards refuſed to be accepted by him; it was accord without ſatisfaction; and the plea there only ſtated a tender and refuſal: whereas here the compoſition was actually accepted by the plaintiff in ſatisfaction of his whole demand. But if that were otherwiſe, the plaintiff ought not to have declared upon the old cauſe of action for goods ſold and delivered, which was done away by the receipt given in conſideration of the compoſition received and the new promiſe; but he ſhould have declared ſpecially upon ſuch new agreement, which was conditional for the payment of the reſidue when the defendant ſhould be of ability. And he cited *Knight* v. *Cox* (*a*), where the creditor having accepted a compoſition and ſigned a releaſe to the defendant, who in conſideration thereof promiſed to pay him the entire debt; it was holden to be a good defence on non aſſumpſit for the original cauſe of action, which was for goods ſold and delivered, and that the plaintiff ought to have declared ſpecially upon the ſpecial promiſe.

Lord ELLENBOROUGH C. J. In the laſt-mentioned caſe the original contract was extinguiſhed by the releaſe:

(*a*) Before *Pemberton* C. J. in *Suſſex*, 1682. *Bull. N. P.* 153.

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but it cannot be pretended that a receipt of part only, though expreſſed to be in full of all demands, muſt have the ſame operation as a releaſe. It is impoſſible to contend that acceptance of 17*l.* 10*s.* is an extinguiſhment of a debt of 50*l.* There muſt be ſome conſideration for the relinquiſhment of the reſidue; ſomething collateral, to ſhew a poſſibility of benefit to the party relinquiſhing his further claim, otherwiſe the agreement is nudum pactum. But the mere promiſe to pay the reſt when of ability put the plaintiff in no better condition than he was before. It was expreſsly determined in *Cumber* v. *Wane* (*a*), that acceptance of a ſecurity for a leſſer ſum cannot be pleaded in ſatisfaction of a ſimilar ſecurity for a greater. And though that caſe was ſaid by me in argument, in *Heathcote* v. *Crookſhanks*, to have been denied to be law; and in confirmation of that Mr. Juſtice *Buller* afterwards referred to a caſe, (ſtated to be that of *Hardcaſtle* v. *Howard*, *H.* 26 *Geo.* 3.); yet I cannot find any caſe of that ſort, and none has been now referred to: on the contrary, the deciſion in *Cumber* v. *Wane* is directly ſupported by the authority of *Pinnell*'s caſe (*b*), which never appears to have been queſtioned.

The other Judges concurred; and *Lawrence* J. referred to *Co. Lit.* 212. *b.* and to *Adams* v. *Tapling* (*c*), as confirmatory of the ſame doctrine: in the former of which it is laid down, that "where the condition is for payment of 20*l.* the obligor or feoffor cannot at the time appointed pay a leſſer ſum in ſatisfaction of the whole, becauſe it is apparent that a leſſer ſum cannot be a ſatisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance *under his ſeal*

(*a*) 1 *Stra.* 426. (*b*) 5 *Rep.* 117. (*c*) 4 *Mod.* 88.

in

in full ſatisfaction of the whole, it is ſufficient, by reaſon *the deed* amounteth to an acquittance of the whole. If the obligor or leſſor pay a leſſer ſum either *before* the day or at *another place* than is limited by the condition, *and* the obligee or feoffee *receiveth it*, this is a good ſatisfaction."

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Rule abſolute.

MILTON *againſt* GREEN and JENNER.

Monday, June 4th.

TRESPASS for breaking and entering the ſtable and cloſe of the plaintiff within the manor of *Grench*, otherwiſe *Grange*, in the pariſh of *Gillingham*, in the county of *Kent*, and taking the plaintiff's goods there, and detaining the ſame until he paid 15*l.* 10*s.* The action was brought in order to try whether the manor of *Grench* lay within and was part of the juriſdiction of the *Cinque Ports* (that is, a member of *Haſtings* in *Suſſex*), or within that part of the pariſh of *Gillingham* which lies within the body at large of the county of *Kent*. If the former, as the plaintiff contended, then he was not liable to be ballotted for a militiaman for the county at large. At the trial of this cauſe before *Hotham* B. at the laſt aſſizes for the county of *Kent*, the following facts were admitted; that the reſidence of the plaintiff and the premiſes mentioned in the declaration, where the diſtreſs was taken, are ſituated *within the manor of* Grench *in the pariſh of* Gillingham; and that previous to the taking of the diſtreſs the plaintiff was convicted by Mr. *Elliott*, a deputy lieutenant and juſtice of the peace acting for the county of *Kent*, of having neglected and refuſed to be duly ſworn and inrolled, or to find a fit ſubſtitute in the *Weſt Kent* militia;

Where goods were taken by conſtables under a warrant of diſtreſs granted by a juſtice of peace for the county of *Kent*, directed "to the conſtables of the Lower Half Hundred of *C.* and *G* in the county of Kent," which warrant recited that the plaintiff (whoſe goods were diſtrained) *of the pariſh of* G. *in the ſaid county*, was ballotted for the militia of the ſaid county, and having refuſed to ſerve, &c. was convicted in a certain penalty, for levying which the warrant was granted: if it turn out that the warrant was executed within a certain part of the pariſh of *G.*, within the juriſdiction of the Cinque Ports, and not within the county of *Kent*, the conſtables are not within the protection of the ſtat. 24 *Geo.* 2. *c.* 44. *ſ.* 6., and may be ſued in treſpaſs without the magiſtrate's being made a defendant.

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he having been ballotted from the liſt of the inhabitants of the pariſh of Gillingham. That *the defendants were* at the date of the warrant and at the time of the ſeizure of the goods, *borſholders of the lower half hundred of* Chatham *and* Gillingham, duly appointed and ſworn. The warrant was as follows: "*Kent*, to wit.—*To the conſtables of the lower* "*half hundred of* Chatham *and* Gillingham *in the ſaid* "*county*, and *to the borſholders there.*—Whereas at a ſubdi- "viſion meeting of his Majeſty's deputy lieutenants and "juſtices of the peace for the ſaid county, holden at "*R.* &c. on the 8th *July* laſt, *Samuel Milton of the pariſh* "*of* Gillingham *in the ſaid county* was choſen by lot to ſerve "in the *Weſt Kent* regiment of militia; and whereas "it appears unto me, one, &c. upon oath, &c. that the "ſaid *S. M.* hath been duly ſummoned to appear at a "ſubdiviſion meeting, &c. to be duly ſworn and inrolled, "or to provide a fit ſubſtitute, &c., and hath neglected "and refuſed ſo to do, whereby he hath incurred the "penalty of 15*l.*; Theſe are therefore to require you to "demand of the ſaid *S. M.* the ſum of 15*l.* by him in- "curred as aforeſaid, and on neglect, &c. of payment, to "levy the ſame by diſtreſs," &c. Dated 20th *Auguſt* 1803, and ſigned *T. Elliott.* That the defendants entered and made the diſtreſs by virtue of the warrant, and that the plaintiff redeemed his goods for 15*l.* 10*s.* There were alſo read various extracts from the minute books of the juſtices and deputy lieutenants for the ſubdiviſion of *Chatham*, diſcharging and excuſing different perſons from the militia for the county of *Kent*, who at the time of the ballots were reſident within that part of the pariſh of *Gillingham* contended to be within the liberties of the *Cinque Ports*. And the plaintiff's counſel alleged that he meant to prove that the part of the pariſh where the plaintiff

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plaintiff lived was not within the lower half hundred of *Chatham* and *Gillingham*, but within that part of the pariſh of *Gillingham* lying within the manor of *Grench*, within the liberties of the *Cinque Ports* (whoſe militia is raiſed diſtinct from the adjoining counties). But it was objected on the part of the defendants, that they having acted only as ſubordinate miniſterial officers under the magiſtrate's warrant, the magiſtrate ought to have been made a party defendant to the action under the ſtat. 24 *Geo.* 2. *c.* 44. *ſ.* 6. And upon that objection the plaintiff was nonſuited.

Beſt Serjt., *Pitcairn*, and *Reynolds* ſhewed cauſe againſt a rule for ſetting aſide the nonſuit. If the conſtables acted in obedience to the warrant of the magiſtrate, he ought to have been joined in the action, and the officers were entitled to an acquittal under the ſtatute for want of ſuch joinder, notwithſtanding any defect of juriſdiction in the magiſtrate granting ſuch warrant. Now here it appears that the magiſtrate has taken upon him to determine that the plaintiff by reſiding in the pariſh of *Gillingham* was liable to ſerve as a militiaman for the county of *Kent*. The fact of the plaintiff's reſidence within the pariſh was within the juriſdiction of the magiſtrate to determine, and if part of that pariſh be without and part within his juriſdiction, it was for the magiſtrate to decide whether the plaintiff inhabited within that part over which he had juriſdiction, and by granting the warrant of diſtreſs againſt the plaintiff he aſſumed to have juriſdiction over that part of the pariſh where the plaintiff reſided. [Lord *Ellenborough* C. J. The conſtables muſt juſtify themſelves under the warrant of diſtreſs, and nothing appears in that to direct the diſtreſs to be taken where it

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was, within the manor of *Grench*. The warrant is directed "to the conſtables, &c. of the lower half hundred of *Chatham* and *Gillingham in the county of* Kent." If the part of the pariſh of *Gillingham* in which the diſtreſs was taken do not lie within the limits of the county of *Kent*, but in another diſtinct juriſdiction, the warrant will no more juſtify the officers in going there to execute it than if they had gone into the county of *Suffolk*. The *Cinque Ports* are, as to the authority of juſtices of the peace, as much a diſtinct juriſdiction from the county of *Kent* as if they were denominated a diſtinct county. The warrant does not ſpecify that the plaintiff reſided within the manor of *Grench*, aſſuming that to be within the juriſdiction of the magiſtrate, or direct the defendants to go there. There is no exceſs of juriſdiction aſſumed on the face of the warrant. It muſt be taken to be applicable to ſuch parts only of the pariſh of *Gillingham* as lie *within the county of* Kent, and thoſe were within the magiſtrate's juriſdiction. *Lawrence* J. If the conſtables had returned to the warrant of diſtreſs that the plaintiff had no goods within the county of *Kent* lying within the magiſtrate's juriſdiction, and that fact were true, they could not have been indicted for diſobedience to the warrant.] In order to make the conſtables executing a warrant liable, the exceſs of juriſdiction muſt be apparent: now here the boundaries of the two juriſdictions are in diſpute, and the limits unknown to the officers, who cannot be expected to decide the doubt at their own peril. If there be a warrant to an officer to ſeize *ſtolen goods*, and he ſeize goods which turn out not to have been ſtolen; ſtill, if he acted bonâ fide, he is within the protection of the ſtatute. *Price* v. *Meſſenger* (*a*). So in *Hill* v. *Bateman* (*b*), though the

(*a*) 2 *Boſ & Pull.* 158. (*b*) 1 *Stra.* 710.

juſtice

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juſtice exceeded his juriſdiction in committing one inſtanter for an offence under the game laws, who had goods whereon a diſtreſs might have been levied, yet the conſtable making the arreſt was protected. This is not like *Blatcher* v. *Kemp* (*a*), where a conſtable of one hundred took upon him to execute a warrant out of his own hundred, directed to the conſtable of another hundred by name, "and to all other peace officers in the county of *Kent*;" which latter direction was conſtrued to mean each *within his own juriſdiction*, according to *Rex* v. *Chandler* (*b*): nor like *Money* v. *Leach* (*c*), where the conſtable arreſting a perſon under a general warrant, illegal on the face of it, was holden not to be within the protection of the ſtatute. The warrant here is to diſtrain the goods of "*Samuel Milton* of the pariſh of *Gillingham* in the county of *Kent*:" and it does not appear that there was any other *Samuel Milton* living in that pariſh than the plaintiff whoſe goods were diſtrained. Non conſtat even that that part of the pariſh of *Gillingham* which lies within the manor of *Grench* is not within the magiſtrate's juriſdiction: but this queſtion cannot be *tried* without making the magiſtrate himſelf a defendant.

Shepherd Serjt. and *Garrow* contrà were ſtopped by the Court.

Lord ELLENBOROUGH C. J. If the magiſtrate had directed the conſtable to execute his warrant within the manor of *Grange*, no doubt the conſtable would have been protected, though it ſhould turn out that the manor of *Grange* is not within the juriſdiction of the magiſtrate. But the objection is not to the warrant, which is proper

(*a*) *Maidſtone* Sum. Aſſ. 1782, cor. Lord *Manſfield*, 1 *H. Blac.* 15. *n.*

(*b*) 1 *Ld. Ray.* 545. (*c*) 1 *Blac.* 555

enough

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enough on the face of it, but that the defendants have choſen to execute it out of the juriſdiction of the magiſtrate granting it. The warrant is only directed to be executed *within the county of* Kent, and for the purpoſe of this argument we muſt aſſume that it was executed *out* of the county. The defendants have not therefore acted in obedience to the warrant, without which they are not within the protection of the ſtatute. If the fact ultimately turn out to be otherwiſe, it will be time enough to take the objection.

GROSE J. The queſtion is, Whether the plaintiff ſhould not be permitted to ſhew that the defendants did the act complained of out of the juriſdiction of the magiſtrate who granted the warrant? The plaintiff does not accuſe the magiſtrate of having ordered the conſtables to do an illegal act, but he accuſes the conſtables of having ſo done without the magiſtrate's authority.

LAWRENCE J. The queſtion is preciſely that which my Brother *Groſe* has ſtated, Whether the plaintiff, after the production of the magiſtrate's warrant by the defendants, ſhould not have been permitted to go on further and to have ſhewn that the defendants had not acted in obedience to that warrant, by taking the goods out of the juriſdiction of the county magiſtrate by whom it was granted? The plaintiff had been ballotted for the militia as a pariſhioner of *Gillingham*, part of which pariſh is confeſſedly within the county of *Kent*. But the plaintiff lives in the other part of the pariſh, contended to be within the manor of *Grench*, which manor is ſaid to be within the juriſdiction of the *Cinque Ports*, and not within the limits of the county magiſtrates: whereas the warrant is

directed

directed to the defendants to be executed *within the county of* Kent. Surely then the plaintiff was at liberty to shew the extent of the manor of *Grench*, and that he resided within that manor, and out of the jurisdiction of the county magistrate. 1804. MILTON *against* GREEN.

LE BLANC J. The complaint is that the plaintiff has been prevented from shewing the whole facts of the case upon which the question arises. He has not been permitted to give evidence that the place where the goods were taken lies without the jurisdiction of the county magistrate, whose warrant is confined to be executed within the county; and consequently that the constables exceeded their authority in executing the warrant in that place. The warrant has "*Kent*" in the beginning of it, and is directed "to the constables of the Lower Half Hundred of *Chatham* and *Gillingham*, *in the said county*, and to the borsholders *there*." If then it were executed in any other part of the Lower Half Hundred of *C.* and *G.* than that which lies *within the county of* Kent, it will be no protection to them.

Rule absolute.

The KING *against* The Inhabitants of CHIPPING-NORTON.

Wednesday, June 6th.

TWO justices removed *Sarah* the wife of *Wm. Townsend* and their children, by name, from the parish of *Chipping-Norton* to the hamlet of *Over Norton*, both in

Where a corporation by a verbal agreement with the pauper leased to him the tolls of a market for above 10*l.* a-year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal: therefore he had no more than a mere licence to collect the toll: but if such toll had been leased to him under seal of the corporation, semble that he would have gained a settlement by residing for 40 days in the same parish where the market was.

the

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the county of *Oxford*: and on appeal the Seſſions ſtated ſpecially that *William Townſhend*, whoſe wife and children were removed, being legally ſettled in the hamlet of *Over-Norton*, went, about eight years ago, to live at *Chipping-Norton*, where he rented a houſe at 8*l.* 10*s.* per ann. The corporation of *Chipping-Norton* is poſſeſſed of the fairs and markets within the borough, and of the toll for all cattle *actually ſold at the ſame*. *W. Townſhend*, at a court leet, took the ſaid toll by a verbal agreement of the corporation at 12*l.* a-year, and continued to collect it under that agreement for two years, when it was agreed that he ſhould have it for 10 guineas: under which laſt agreement he continued to collect it for ſeveral years more. Whereupon the Seſſions were of opinion that *W. Townſhend* gained a ſettlement *by virtue of renting a tenement of upwards of* 10*l. a-year*; and diſcharged the order; ſubject to the opinion of this Court.

Gibbs, *Abbott*, and *Peckwell*, in ſupport of the order of Seſſions, contended that the pauper, by taking the market tolls at above 10*l.* a-year, took a tenement within the ſtatute, by which, and reſidence in the ſame pariſh for 40 days, he gained a ſettlement. An *incorporeal* tenement is a tenement within the ſtatute: Lord *Kenyon*, in *Rex* v. *Piddletrenthide* (*a*), ſaid it had been often ſo decided; and ſo ſaid Lord *Ellenborough* in *R.* v. *Hollington* (*b*). And in the former caſe it was holden that renting a rabbit warren would gain a ſettlement, though the ſoil did not paſs. A free warren, he alſo ſaid, would give a ſettlement, and that a præcipe would lie for it. And *Buller* J., in *R.* v. *Old Alresford* (*c*), thought the ſame of a free fiſhery. So

(*a*) 3 *Term Rep.* 775. (*b*) 3 *Eaſt*, 114.
(*c*) 1 *Term Rep.* 361.

tithes

tithes are a tenement (*a*). Market tolls are freehold; and can only be deviſed according to the requiſites of the ſtatute of frauds. The word *tenements*, ſays Lord *Coke* (*b*), includes not only all corporate inheritances which are or may be holden, but alſo "all inheritances iſſuing out of any of thoſe inheritances, or concerning or annexed to or exerciſable within the ſame, though they lie not in tenure; therefore theſe may, without queſtion, be intailed, as rents, eſtovers, commons, or other profits whatſoever granted out of land; or uſes, offices, dignities, which concern lands, or certain places, &c. becauſe all theſe ſavour of the realty." A Quod permittat lay for tolls at common law (*c*). And ſo does an aſſize (*d*) for tolls of a market. So a woman may be endowed of tolls (*e*) and ſtallage. The origin of toll in a market was probably connected with the right of the ſoil, though long ſince diſſevered. If it had been merely to teſtify the contracts of ſale made there, it could never have been conſidered as a privilege to be exempt from it, ſuch as tenants in ancient demeſne claim. The renting of tolls has been ſo much conſidered as the taking of a tenement within the ſtat. 13 & 14 *Car.* 2., that by *ſ.* 56 of the general Turnpike Act, 13 *Geo.* 3. *c.* 84., it is expreſsly provided that no toll-gate keeper ſhall gain a ſettlement by renting the tolls.

Mackaneſs (and with him were *Erſkine* and *Lockart*) contended that this was a mere perſonal contract with the pauper, giving him liberty to collect the tolls from the vendors of cattle, and not a tenement within the words

(*a*) *R.* v. *Skingle*, 1 *Stra.* 100. (*b*) *Co. Lit.* 19. *b.* 20.
(*c*) Vide *Fitz. Na. Brev Quod Permittat.*
(*d*) *Webb's* caſe, 8 *Rep.* 46. *b.* (*e*) *Co. Litt.* 32. *a.*

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of the ſtatute, or within the principle of any of the adjudged caſes; but more like the caſes of *R.* v. *Hammerſmith* (*a*), *R.* v. *Dodderhill* (*b*), and *R.* v. *Mellor* (*c*). And he referred to *Woddeſon*'s Lectures, and was purſuing this courſe of argument, when another objection was ſtarted, that the pauper had no title to the tolls, even ſuppoſing that ſuch a taking could confer a ſettlement; for that a corporation could only demiſe under *ſeal*, and here the tolls were ſtated to have been taken by a *verbal* agreement.

Lord ELLENBOROUGH C. J. thereupon ſaid, that as no intereſt paſſed to the pauper by ſuch parol demiſe, the queſtion could not be raiſed. It was a mere licence to him to collect the tolls, the right to which ſtill remained in the corporation; though it might be a ground on which to apply to a court of equity. The Court, he added, had gone far enough from the words of the ſtatute in noticing an incorporeal tenement as one the taking of which could confer a ſettlement; but if, beyond that, they were to hold that an equitable intereſt in an incorporeal tenement under a parol demiſe from a corporation, which could only demiſe by deed, could confer a ſettlement, there would be no ſaying where to ſtop. His Lordſhip, however, added, that if this laſt difficulty could be gotten rid of by any alteration in the ſtatement of the caſe, he thought that the other point, as to the taking of the tolls being a taking of a tenement within the conſtruction which had been put upon the ſtatute, might be diſpoſed of in favour of the ſettlement, upon the authority of Lord *Coke*, in his comment upon the ſtatute of *Weſtminſter*, 2., and on *Webb*'s caſe, 8 *Rep.*, and on the opinion

(*a*) 8 *Term Rep.* 450. *n.* (*b*) *Ib.* 449. (*c*) 2 *Eaſt.* 189.

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of Lord *Kenyon*, in the caſe referred to, that a taking of an incorporeal tenement will confer a ſettlement.

The Court therefore directed an inquiry to be made whether any intereſt in the tolls had paſſed from the corporation under their ſeal to the pauper, or any perſon under whom he might claim: and in the mean time they made an order niſi for quaſhing the order of Seſſions, if no ſuch fact exiſted. And after inquiry made, it being reported to the Court on a ſubſequent day that no other inſtrument had been executed except a bond given by the pauper to the corporation with ſureties for the rent, the Court ſaid that could convey nothing *from* the corporation: and the rule ſtood for quaſhing the order of Seſſions.

Order of Seſſions quaſhed.

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Wednesday, June 6th.

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AN information was filed by the Attorney-General against the defendants, framed on the ſtat. 33 *Geo.* 3. *c.* 52. *ſ.* 62. (*a*), for receiving bribes from certain natives of *India*, whilſt the defendants held certain offices in the ſervice of the *Eaſt India* Company, which ſet forth that *J. Stevens*, being a *Britiſh* ſubject, on *the* 1ſt of *January* 1794, and for a long time thence next enſuing, to wit, *until* the 29th of *November* 1795, held and exerciſed the office of ſupervifor of the province of *Malabar* in the *Eaſt Indies*, under the *Eaſt India* Company, and *during all that time* reſided in the *Eaſt Indies*: and that the defendant *Agnew*, being a *Britiſh* ſubject, on the ſaid firſt of *January* 1794, and for a long time thence next enſuing, to wit, *until* the 29th of *November* 1795, held and exerciſed the office of commercial reſident at *Calicut* in the *Eaſt Indies*,

Every indictment muſt contain a complete deſcription of ſuch facts and circumſtances as conſtitute the crime, without inconſiſtency or repugnancy. But except in certain caſes where technical expreſſions, having grown by long uſe into law, are required to be uſed, the ſame ſenſe is to be put on the words of an indictment which they bear in ordinary acceptation. And if the ſenſe of any word be in ordinary acceptation ambiguous, it ſhall be conſtrued according as the context and ſubject matter require it to be, in order to make the whole conſiſtent and ſenſible. The word *until* may therefore be conſtrued either excluſive or inclusive of the day to which it is applied, according to the context and ſubject-matter. Therefore, where, in an indictment on the ſtat. 33 *Geo.* 3. *c.* 52. *ſ.* 62., prohibiting *officers* of the *Eaſt India* Company, *reſiding in* India, from receiving preſents, the information charged that the defendants, being *Britiſh* ſubjects, on the 1ſt of *January* 1794, and from thence for a long time, to wit, *until* the 29th of *November* 1795, held certain offices under the Company, and *during all that time reſided* in the *Eaſt Indies*; and that *whilſt* they held the ſaid offices *as aforeſaid*, and *whilſt* they reſided in the *Eaſt Indies as aforeſaid*, to wit, *on the 29th of* November 1795, they received certain preſents; held that the context ſhewed that the word *until* was to be taken *inclusive* of the 29th of *November* 1795. But that if it had been incapable of receiving an inclusive conſtruction, the words under the firſt, videlicet, "*until the 29th of* November 1795," could not have been rejected as ſurpluſage: for that can never be where the allegation is ſenſible and conſiſtent in the place where it occurs, and not repugnant to *antecedent* matter, *though laid under a videlicet*, and however inconſiſtent with an allegation *ſubſequent*.

(*a*) It is thereby enacted, "That the demanding or receiving any ſum of "money or other valuable thing as a gift or preſent, or under colour thereof, "whether it be for the uſe of the party receiving the ſame, or for or pre- "tended to be for the uſe of the ſaid Company, or of any other perſon what- "ſoever, by any *Britiſh* ſubject *holding or exerciſing any office* or employment "under his Majeſty or the ſaid United Company, *in the* Eaſt Indies, ſhall be "deemed extortion and a miſdemeanor at law," &c.

under

under the ſaid United Company, and *during all that time* reſided in the *Eaſt Indies*. And that the defendant *Stevens*, ſo being a *Britiſh* ſubject as aforeſaid, *whilſt he held and exerciſed the ſaid office* of ſupervifor of the province of *Malabar* in the *Eaſt Indies* aforeſaid, under the ſaid United Company as *aforeſaid*, and *whilſt he reſided* in the *Eaſt Indies as aforeſaid*; and the defendant *Agnew*, ſo being a *Britiſh* ſubject as aforeſaid, *whilſt he held and exerciſed the ſaid office* of commercial reſident at *Calicut* in the *Eaſt Indies*, under the ſaid United Company *as aforeſaid*, and *whilſt he reſided* in the *Eaſt Indies as aforeſaid*, did, within ſix years before the filing of this information, to wit, on the 29th of *November* 1795, in the *Eaſt Indies* aforeſaid, receive of and from a certain perſon in the *Eaſt Indies* aforeſaid, called the Samoory, otherwiſe the Zamorin Rajah, 100,000 rupees, being of the value of 12,500*l.*, as a gift and preſent, againſt the form of the ſtatute, &c.; whereby, and by force of the ſtatute, they the defendants committed extortion, and, by force of the ſaid ſtatute, forfeited to the king the ſaid ſum of 12,500*l.*, being the value of the ſaid R. 100,000 ſo received by them as aforeſaid.

In *Eaſter* Term laſt a motion was made in arreſt of judgment, for want of a ſufficient averment in the information that the defendants were *Britiſh* ſubjects *reſiding in* India, *and holding employments there* under the Crown or the *Eaſt India* Company *at the time of the offence committed* in receiving the preſents. And it was contended, 1ſt, that every information muſt contain an averment of the time of any material fact alleged in it. 2dly, That if time be alleged to any material fact which is inconſiſtent with other facts and times alleged in the information, which makes the information repugnant to itſelf, it is

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void. 2 *Hawk. ch.* 25. *ſ.* 77. That here the reſidence and ſervice of the defendants in *India* is laid to have continued *until* the 29th of *November* 1795, which word *until* was excluſive of that day, and the receipt of the preſents by them is alleged to have been *on* the ſaid 29th of *November*, and conſequently after their reſidence in *India* and ſervice under the Company there had ceaſed, when they were no longer within the prohibition of the act of the 33 *Geo.* 3. *c.* 52. *ſ.* 62. And *Rex* v. *Gamlingay* (*a*) was cited, where the word *unto*, in an indictment deſcribing a road as leading *unto* ſuch a place, was holden to be excluſive of that place. And the word *until* was argued to have the ſame meaning as to *time* which *unto* had as to *place*.

The Attorney-General, *Erſkine*, *Garrow*, *Adam*, *Wood*, and *Abbott* ſhewed cauſe againſt the rule; and admitting that it was eſſential to the completion of the offence created by the act of parliament, and to the validity of the charge in the information, that the defendants ſhould appear to have been *Britiſh* ſubjects reſident in *India*, and holding their employments ſtated at the time of the offence committed, and that a certain day ſhould be ſtated for the commiſſion of it, they contended that theſe facts did appear with ſufficient certainty on the day when the offence is alleged to have been committed. For firſt, the word *until* is in itſelf ambiguous, and is uſed indifferently either incluſively or excluſively, according to the ſubject matter or context, and that, not only in common parlance, (of which they gave many familiar examples,) but in legal language, and by good writers. 5 *Com. Dig. Temps*, 498. *Dies Juridici C.* 2, 3. ſays, that "*Eaſter* term anciently began *Oct. Paſchæ*, &c. but afterwards the beginning was

(*a*) 3 *Term Rep.* 513.

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deferred *till Quinden. Paſchæ*, &c. when it now begins." An adjournment *until* ſuch a day is neceſſarily incluſive of that day. The ſtat. 51 *H.* 3. *ſt.* 3. concerning general days in a writ of dower, directs that if the writ do come in *Octavis Michaelis*, day ſhall be given *in* craſtino animarum, which is tranſlated *until* craſtino animarum, &c. The form of a commitment of a felon to the aſſizes is "*until* the next gaol delivery (*a*)." In proceedings for murder the indictment charges the ſtroke on a certain day, and that from that day the deceaſed languiſhed and languiſhing did live *until* another day, on which day he died, &c. (*b*): the words in Latin were, languebat uſque ad decimum nonum diem menſis Decembris anno 28, quo quidem decimo nono die, &c. obiit, &c. (*c*). And the ſentence of the law is to be hanged *until* he be dead. In all theſe inſtances *until* muſt be taken incluſively. Nothing is more frequent in writers than to add the word *incluſive* or *excluſive* after the word *until*; which ſhews that it is capable of either meaning; and yet if it were neceſſarily *excluſive*, the addition of *incluſive* after it would be manifeſtly repugnant and abſurd. If then it may be uſed incluſively without any addition to it, and muſt neceſſarily be taken to be ſo uſed if the word *incluſive* be added to it, the ſame meaning may as clearly be manifeſted from the context, if the ſubject matter to which it is applied neceſſarily require it to be ſo underſtood in order to make the whole intelligible and conſiſtent. Now here the context is equivalent to the addition of the word *incluſive*; for the offence is alleged to have been committed *whilſt the*

(*a*) 1 *Burn's Juſt.* tit. *Commitment*, *pl.* 2. at the end.

(*b*) *Carney's* caſe, O. B. *Sep.* Seſſ. 1803. *Wall's* caſe, O. B. *January* 1802. *Earl Ferrers'* caſe, 19 *St. Tr.* 481.

(*c*) *Haydon's* caſe, 4 *Rep.* 41.

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defendants held and exerciſed the ſaid offices, under the Company *as aforeſaid*, and *whilſt they reſided in the* Eaſt Indies *as aforeſaid*, to wit, *on the* 29*th of* November 1795, it having been before alleged that they reſided in the *E. I.*, and held their offices *until* the 29th of the ſame *November*. That ſhews that the word *until* is uſed there incluſively of the 29th of *November* 1795, even if the very nature of the charge did not, as it neceſſarily muſt, require that interpretation to make it available. Suppoſing therefore that *until* might in its original ſignification have been as much excluſive as applied to time, as *unto* has been determined to be as to place, yet uſage which gives the jus et norma loquendi has now warranted the uſe of it either way. As in *Pugh* v. *The Duke of Leeds* (*a*), the word *from*, though in ſtrictneſs excluſive, was yet holden to be either excluſive or incluſive according to the context and ſubject matter; and that the Court would give it that conſtruction in an inſtrument as would beſt effectuate the apparent intention of the parties. And here it cannot be doubted but that *until* was uſed incluſively by the drawer of this information. In queſtions of ſettlement nothing is more common than hirings *from* Michaelmas in one year, *to* or *until* Michaelmas in the next; and theſe have been always conſtrued to include one of the *Michaelmas* days, ſo as to complete the hiring for a year (*b*). The word *to* (*c*) is uſed ſometimes incluſively, as in the form prefixed to the ſtatutes at the beginning of a ſeſſions of parliament, after prorogation, the ſtyle is, "at a parliament began and holden at *Weſtminſter* the 12th of *July*,

(*a*) *Cowp.* 714.

(*b*) *R* v *Syderſtone cum Bernar*, *E.* 17 *Geo.* 3. *Cald.* 19.; and 3 *Burn's Juſt.* tit. *Poor*, *Sett. by Service*; and *R.* v. *Navenſtock*, *Burr.* S. C. 719.

(*c*) Vide note, poſt. p. 256.

&c.

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&c. and from thence continued by several prorogations *to* the 20th of *November*," &c. This describes a sessions opened *on* the 20th of *November*. In *R.* v. *Horne* (*a*), Lord C. J. *De Grey* referring to Lord *Coke*'s definition of certainty, says, that the last sort, namely, "a certainty to a certain intent in every particular," is rejected in all cases, as partaking of too much subtlety. None of the instances of impossible, uncertain, or repugnant allegations of time in indictments, which are referred to in the margin of *Hawkins*, apply to this case. That of *Moor*, 555. was an allegation of a murder committed on the 31st of *June*, which was an impossible day. In *Rast. Entr.* 263. the indictment laid the felony on a day not then come. Another reference is to the year-book, 2 *H.* 7. 7. *pl.* 22 where an indictment for felony charged that two several persons on two several days stole the goods. all these were no doubt defectively charged. The only other reference to this branch is to 2 *Hawk c.* 23. *s.* 88., where a mortal stroke being alleged to be given on the 10th, and the death on the 20th of *December*, an allegation in the conclusion, that the defendant murdered the deceased on the 10th, would of course be clearly repugnant to the allegation of the death on the 20th. But *Hawkins*, in *s.* 89. states it to have been holden, "that an allegation of the day primâ facie somewhat uncertain *may be holpen by the apparent sense of the whole*," of which he proceeds to give an instance. But supposing the word *until* to be necessarily *exclusive*, yet the words "*until* the 29th of *November* 1795" being laid under a *viz.* may be rejected as surplusage, the allegation being inconsistent with what follows, namely, that the defendants did on the 29th of *November* 1795, and whilst

(*a*) *Cowp.* 682.

they

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they reſided in *India* and held their employments, receive the preſents. Then, rejecting thoſe words, the information will read thus; "that *J. S.* being a *Britiſh* ſubject, on the 1ſt of *January* 1794, and for a long time thence next enſuing, held and exerciſed the office, &c.; and that whilſt he held and exerciſed the office, &c., and whilſt he reſided in the *Eaſt Indies*, &c. as aforeſaid, to wit, on the 29th of *November* 1795, he received the preſents," &c. In *Jenſon* v. *Meers* (*a*), it was reſolved that where matter comes after a ſcilicet which is repugnant to what went before, it ſhall be rejected: and ſo it was done in *Jones* v. *Williams* (*b*). [Lord *Ellenborough* C. J. Here the repugnancy is not to *antecedent* but to *ſubſequent* matter.] There can be no difference in principle whether the repugnant matter be before or after the ſcilicet, for the whole indictment muſt be conſtrued together.

Dallas, *Gibbs*, and *Torkington*, in ſupport of the rule, contended, 1ſt, that *until* according to its natural and legal import was a word of *excluſion*. It is the ſame in reſpect of *time* as *unto* is in reſpect of *place;* and both mean *to*. And they mentioned various inſtances in common parlance where thoſe words muſt be taken in an excluſive ſenſe. The form of the indictment in murder proves nothing to the contrary: for the deceaſed may languiſh to the laſt moment of one day, and die on the next, which would verify the allegation there uſed. *Rex* v. *Gamlingay* (*c*) is in point, that the ſynonimous word *unto* is *excluſive* of place. And in *Nichols* v. *Ramſden* (*d*) it was holden, even in the caſe of a civil action, that *until* was excluſive as to time; for there a releaſe of all treſ-

(*a*) 12 *Mod.* 579.
(*b*) *Hardr.* 3.
(*c*) 3 *Term Rep.* 513.
(*d*) 2 *Mod.* 280.

paſſes

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paſſes *uſque ad* the 24th of *April* was deemed not to include that day. And it was admitted on all hands that in pleading the word *uſque* was generally *excluſive*; and the majority of the Court ſaid, that in a releaſe of all demands *till* the 26th of *April*, a bond dated that day is not releaſed: and ſo it was reſolved in *Newman* v. *Beaumond* (*a*). Then a ſingle inſtance of a wrong tranſlation of the word *in* (*in* craſtino animarum) rendered *until* inſtead of *upon*, in the ſtat. 51 *H.* 3. *ſt.* 3. will not vary the legal underſtanding of the word. 2dly, Caſes on contracts, ſuch as ſettlement caſes, do not apply; for they are to be conſtrued according to the apparent intention of the parties, to be collected from the ſubject matter of the contract; and in *R.* v. *Naveſtock* (*b*) Lord *Mansfield*, in order to conſtrue the word *till* as incluſive of *Michaelmas* day, reſorted to the cuſtom of the country. So *Pugh* v. *The Duke of Leeds* turned on the conſtruction of a contract, and the intention of the parties. But in an indictment nothing can be taken by intendment or implication, but every material fact muſt be poſitively alleged with a certain time and place. 3dly, Suppoſing the word *until* to be ſo far equivocal as to be capable in a criminal charge of receiving an incluſive interpretation according to the ſubject matter; yet if nothing appear to give it ſuch a preciſe meaning, it muſt be conſtrued excluſively according to its natural and legal import: and here nothing of that ſort appears; for the ſubject matter is, that the defendants were in office in *India* from the 1ſt of *January* 1794 *until* the 29th of *November* 1795; and nothing can be collected from thence, even if it were a contract of hiring and ſervice from the one period to the other, to ſhew that *until* was incluſive of the laſt-mentioned day.

(*a*) *Owen*, 50. (*b*) *Burr.* S. C. 719.

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No presumption can be made either way, as in cases of settlement, where if the hiring be general or equivocal, the legal presumption is that it was for a year. Then the subsequent allegation, that the offence was committed while the defendants were in office and resident in *India*, is an independent allegation, not connected by any word of reference to the preceding time alleged, as by the word *so* resident, or during *the* SAID *time* while, &c.; for the words *as aforesaid* refer only to the fact of holding the offices under the *East India* Company. It is therefore no explanation of what goes before, but a contradictory allegation of time; which cannot avail unless the former be rejected. But, 4thly, the words, "*until* the 29th of *November* 1795," being in themselves sensible and apposite in the place where they are used, cannot be rejected as surplusage merely because they are under a *videlicet*. In *Stukeley* v. *Butler* (*a*), Lord C. J. *Hobart* speaking of the use of a videlicet, says, that "it is *clausila ancillaris*, a kind of handmaid to another clause, and to deliver her mind and not her own; and therefore it is a kind of *interpreter*. Her natural and proper use is to particularise that that is *before* general, &c., or to explain that that is doubtful or obscure. First, it must not be contrary to the premises, &c. Next, it must neither increase nor diminish; for it is not in the nature of it to give of itself. But on the other side I grant, that a *viz.* may work a restriction where the *former* words were not express and special, but so indifferent that they may receive such a restriction without apparent injury," &c. So in *Skinner* v. *Andrews* (*b*), it was agreed in argument that a videlicet which is repugnant to the *preceding* matter is merely void; but where it is not repugnant to the preceding matter, but well agrees

(*a*) *Hob.* 172. (*b*) 1 *Saund.* 169, 170.

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with it, there it is a direct affirmation and ſhall be taken poſitively, as in the caſe laſt mentioned: and of this opinion was the Court. If then it be not repugnant to *preceding* matter, which it cannot be pretended here to be, it cannot be rejected as ſurpluſage. And *Hawkins* ſo conſiders it in the place before cited (*a*); for there an inſtance is given of an appeal conſidered to be inſufficient, becauſe of repugnancy of the time when a defendant is charged to have abetted to the murder, viz. at the day of the death, and not of the ſtroke, which was laid at an antecedent day; and yet the date which gave riſe to ſuch repugnancy was laid under a *viz.* And ſo the rule is laid down in *Hayman* v. *Rogers* (*b*), that where that which comes under a *ſcilicet* is conſiſtent with what went *before*, it is always looked on as an *averment*; but if it be inconſiſtent, it is rejected. Then 5thly, if the word *until* be in itſelf a word of excluſion, and be not explained by any word of reference from other parts of the information to have been uſed incluſively of the 29th of *November* 1795, and if that date being ſenſible cannot, though laid under a viz., be rejected on account of its repugnancy to any *ſubſequent* matter; then it will appear that the defendants only continued reſident in *India* and in office up to a period excluſive of the 29th of *November* 1795, and the ſubſequent allegation that the offence was committed *while* they were in office and reſident in *India*, viz. on the 29th of *November* 1795, is repugnant to what went before, and cannot be taken in contradiction to the former averment, that they only continued reſident there in office till that day; and conſequently the information is bad for repugnancy and uncertainty.

(*a*) 2 *Hawk. ch.* 23. *ſ.* 89. (*b*) 1 *Stra.* 232.

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After the *Attorney General* was heard ſhortly in reply, the Court ſaid they would look into the caſes cited. And on this day

Lord ELLENBOROUGH C. J. delivered judgment.

The defect which has been pointed out on this record is ſuppoſed to conſiſt in a repugnancy, in alleging the offence which the defendants are charged to have committed on a particular day, "*whilſt* they reſided in the *Eaſt Indies*, and held their reſpective offices under the *Eaſt India* Company," (circumſtances eſſential to the legal exiſtence of ſuch offence); which particular day does not fall within the period of time during which they had been before alleged to have reſided and holden their offices, but without and beyond that period. It has been contended, on the part of the Crown, that this repugnancy, if it exiſt at all, may be cured by rejecting as ſurpluſage the words under the *ſcilicet*, which contain that ſpecification of time out of which the alleged incongruity afterwards ariſes, namely, the words "*until the 29th day of* November *in the year of our Lord* 1795." This defect, if it be one, cannot, as appears to me, be ſatisfactorily obviated in the manner ſuggeſted; for I do not find any authority in the law which warrants us in rejecting any material allegation in an indictment or information which is ſenſible and conſiſtent in the place where it occurs, and is not repugnant to any *antecedent* matter, merely on account of there occurring afterwards, in the ſame indictment or information, another allegation inconſiſtent with the former, and which latter allegation cannot itſelf be rejected, as it is clear that the allegation of the 29*th of* November 1795, ſtated as the day of committing the of-

ſence, could not in this caſe be rejected without leaving the information wholly deſtitute of the neceſſary allegation of a particular day on which the offence was committed. If the *ſubſequent* repugnant matter could be rejected at all, (which in this caſe it cannot for the reaſon before given,) it might be ſo in favour of the *precedent* matter, according to what is ſaid by Lord *Holt* in *Wyatt* v. *Aland*, *Salk.* 325., "that where matter is nonſenſe by being contradictory and repugnant to ſomewhat *precedent*, there the *precedent* matter, which is ſenſe, ſhall not be defeated by the repugnancy which *follows*; but that which is contradictory ſhall be rejected." But here the matter required to be rejected is *precedent* matter, and is alſo in the place where it occurs ſenſible and liable to no objection whatever. But it is ſaid that there is no neceſſary repugnancy between the ſeveral allegations made on this record upon the ſubject of time, and that by conſtruing the word *until*, which occurs under the *ſcilicet*, (and upon which this queſtion turns,) as a word *incluſive* of the day to which it is adjoined and applied, and not *excluſive* of it, that the ground of the objection will be removed and the difficulty no longer exiſt. On the other ſide, however, it is contended, on the authority of *Nichols* v. *Ramſden*, 2 *Mod.* 280., and *Owen*, 50., that in legal proceedings the word *until* muſt have an *excluſive* ſenſe; and it has been argued, from the analogy it bears to the word *unto* (which word generally bears the ſame relation to *place*, which *until* does to *time*,) that the caſe of *The King* v. *Gamblingay*, 3 *Term Rep.* 313., is to be conſidered as an authority to the ſame effect. Theſe words, however, have obtained, in ordinary uſe, an equivocal ſenſe at leaſt, of which many inſtances were given at the bar; and I will mention two others. In Sir *Matthew Hale's Hiſtory*

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of the Common Law, p. 165., he says, "thus much shall "serve for the several periods or growth of the common "law *until* the time of *Edward* the 1st *inclusively*." An instance which proves that *until* ex vi termini does not imply *exclusion*; for if it did, the words above stated "*until* and *inclusively*" would involve a contradiction in terms; but that it may, from its context, receive an *inclusive* sense. And in *Ayliffe's Parergon*. p. 152. it is said, "The whole course or mode of judicial proceedings is "divided into three parts; the first lasts from the date of "the citation TO the joining of the issue, or contestation "of the cause *exclusively*; the second continues TO a con-"clusion in the cause *inclusively*; and the third endures "from a conclusion in the cause to the time of pro-"nouncing a definitive sentence *inclusively*:" which *last instance* shews that the word *to* may be used either in an inclusive or exclusive sense (*a*); and *both of them* prove that where exactness is wanted, and ambiguity is to be avoided, some words are necessary to mark and define the precise meaning of the words *to* and *until*, whether applied to time or other subject, and that without them the reader may be often uncertain in which sense they are to be understood. If the word *until* occurred in a contract,

(*a*) There is a recent instance of the use of the words *to* and *from*, one or other of which must have been meant inclusively by the Legislature in the stat. 40 *Geo.* 3. *c.* 50., which enacts "that persons entering any forest, &c. "in the night, *i. e.* between the hours of eight at night and six in the morn-"ing, *from* the 1st of October *to* the 1st of *February*, or between the hours "of ten at night and four in the morning *from* the 1st of February *to* the 1st "of *October* in every year, having any gun, &c. to kill game," &c. shall be deemed rogues and vagabonds within the stat. 17 *Geo.* 2. *c.* 5. Now unless either the word *to* or the word *from* be understood inclusively, the offences provided against might be committed with impunity *on* the 1st of *October* and the 1st of *February*, which could not have been the intention of the Legislature.

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and the context or ſubject-matter evidently ſhewed that it was meant in an *inclusive* ſenſe, there can be no doubt but that the Court, in furtherance of ſuch intention, would ſo conſtrue it. This the caſes of *The King* v. *Naveſtock*, *Burr.* S. C. 719., *Rex* v. *Syderſtone cum Berner*, *Cald.* 19., and *King* v. *Skiplam*, 4 *T. R.* 490., fully ſhew. And in the caſe of *Wyatt* v. *Aland*, *Salk.* 325., which was a penal action for uſury by a common informer, and governed of courſe by the ſame rules of conſtruction which apply to indictments, Lord *Holt* ſaid, "*that where a matter is capable of different meanings*, that ſhall be taken which will *ſupport the declaration or agreement*, and not the other which would defeat it: in which *Powell* J., who differed on another point of the caſe, appears to have agreed: and the Court gave judgment in that caſe upon a conſtruction founded on the principle ſo laid down by Lord *Holt*. The matter muſt be *capable* of different meanings; for the Court cannot, in order to ſupport the proceeding in which the particular term occurs, arbitrarily give it a meaning againſt which the uſe, habits, and underſtanding of mankind would plainly revolt. But if it *be clearly capable* of different meanings, it does not appear to claſh with any rule of conſtruction, applied even to criminal proceedings, to conſtrue it in that ſenſe in which the party framing the criminal charge muſt be underſtood to have uſed it, if he intended that his charge ſhould be conſiſtent with itſelf. And this at leaſt we may ſuppoſe him to have intended. But in this caſe the meaning does not wholly reſt upon what muſt have been the intention of the perſon who filed this information, but upon the context; for the ſenſe in which the framer of this information actually uſes the word UNTIL in the firſt clauſe of it is explained by the next clauſe, wherein he ſays that "*whilſt the de-*

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fendant held the ſaid office" as "AFORESAID;" that is, "as he, the framer of the information, *had before ſtated*," namely, (as he explains himſelf,) *on the* 29*th of* November 1795. Or it may be put thus; "That *on the* 29*th of* November 1795, *whilſt* he ſo held the ſaid office *as before ſtated*;" which of courſe expreſſes that the framer of the information underſtood himſelf to have already ſtated that the defendant did hold the office on that day, and which could only have been ſo ſtated by him, in reſpect of his having uſed the word *until* in an *incluſive ſenſe*. In effect, by means of the word *aforeſaid*, the word UNTIL, uſed in the foregoing ſentence, is drawn down and incorporated in the ſubſequent one, where the whole of the words taken together impoſe by context on that word an *incluſive* ſenſe. Suppoſe, for the purpoſe of illuſtration, that inſtead of the words, "*as aforeſaid*," we ſhould ſubſtitute that part of the foregoing ſentence to which thoſe words relate; the ſentence will then ſtand thus: "And the ſaid "Attorney-General further ſaith, that the ſaid *James Ste-* "*vens*, being a *Britiſh* ſubject, whilſt he held and exerciſed "the office of ſupraviſor of the province of *Malabar*, on "the 1ſt day of *January* 1794, and for the ſpace of time "next enſuing that day *until the* 29*th day of* November, "*on the* 29*th day of* November did receive," &c. Or ſuppoſing it to be read thus: "That the ſaid *James Stevens*, "being a *Britiſh* ſubject, *on the* 29*th day of* November "1795, *whilſt* he held and exerciſed the office of ſupra- "viſor of the province of *Malabar* for the time next enſu- "ing the firſt day of *January* 1794, *until the* 29*th day of* "November 1795, did receive," &c. Now in either of theſe ways of reading it, the ſenſe in which the word *until* is uſed will be found to be clearly *incluſive*; for unleſs it be ſo, the defendant could not, as before alleged,

receive the preſent during the antecedently alleged time of holding his office. And that this is no forced or ſtrained conſtruction will appear from this, viz. that if the receipt had been alleged to have taken place on ſome ſpecified day between the 1ſt of *January* and the 29th of *November*, the allegation "*whilſt* he held the office of ſupraviſor," &c. would have been ſuperfluous; inaſmuch as it would have neceſſarily reſulted from a mere compariſon of dates that the receipt was *whilſt he held his office*. Juſt as in an appeal of murder, it is ſufficient, where the ſtroke is laid on one day, and the death on another, to allege the death to have happened on ſome one day *which is within a year and a day of the ſtroke*, without expreſsly averring that the party died within that particular period of time from the ſtroke. And as the words "*whilſt he held*," &c. are now uſed where the day of the receipt may be with reference thereto ambiguous, they can only be uſed with propriety as determining the 29th of *November* to be *incluſive*; becauſe the words, "*whilſt* he held and exerciſed the ſaid office," unconnected with any particular day, would of themſelves be inſufficient; as the receipt could not be alleged generally to have taken place at a time between two days. As applied however to the day on which the receipt is here ſtated to have taken place, they are not ſuperfluous, but operate materially in marking that ſuch day is to be conſidered as *incluſive*, and for which purpoſe alone they can be uſeful or effective. Every indictment or information ought to contain a complete deſcription of ſuch facts and circumſtances as conſtitute the crime, without inconſiſtency or repugnancy: and except in particular caſes where preciſe technical expreſſions are required to be uſed, there is no rule that other words ſhall be employed than ſuch as are in ordinary uſe; or,

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that in indictments or other pleadings a different ſenſe is to be put upon them than what they bear in ordinary acceptation. And if, where the ſenſe may be ambiguous it is ſufficiently marked by the context, or other means, in what ſenſe they are intended to be uſed, no objection can be made on the ground of repugnancy, which only exiſts where a ſenſe is annexed to words which is either abſolutely inconſiſtent therewith, or being apparently ſo, is not accompanied by any thing to explain or define them. If the ſenſe be clear, nice exceptions ought not to be regarded: in reſpect of which Lord *Hale* (*a*) ſays, that "more offenders eſcape by the over eaſy ear given "to exceptions in indictments than by their own inno-"cence, and many heinous and crying offences eſcape "by theſe unſeemly niceties, to the reproach of the law, "to the ſhame of the government, and to the encourage-"ment of villainy and the diſhonour of God." Upon the whole, it appears to us that the word "*until*" is capable in this caſe of receiving an *incluſive* meaning: and that not only the preſumed intention of conſiſtency on the part of the framer of the information requires that the word ſhould be thus underſtood, but that the context immediately connected with the words "*whilſt*" and "*as aforeſaid*" warrant us in adopting this meaning of it. And which meaning ſo adopted by us removes the whole ground of the repugnancy ſuppoſed to exiſt in this information.

Rule diſcharged.

(*a*) 2 *Hale's P. C.* 193.

POSTAN *againſt* STANWAY, Executrix.

Wedneſday, June 6th.

LORD ELLENBOROUGH C. J. delivered the opinion of the Court in this caſe, after time taken to conſider of it.

This was a rule obtained by the defendant, calling on the plaintiff to ſhew cauſe why the Maſter ſhould not be directed to review his taxation and to tax for the defendant her coſts of the iſſue found for her. It was an action of aſſumpſit, to which the defendant pleaded, 1ſt, the general iſſue to the whole; 2d, the ſtatute of limitation to the whole; 3d, as to ſo much of the promiſes and undertakings in the declaration mentioned as relate to 15*l.* 15*s*, part of the ſeveral ſums therein mentioned, that ſuch promiſes as to the ſaid 15*l.* 15*s.*, part, &c. were made by her teſtator and one *Haſſels* jointly, and which ſaid *Haſſels* ſurvived the teſtator. The replication joined iſſue on the two firſt pleas; and to the laſt plea replied that the promiſes as to the ſaid 15*l.* 15*s.* were made by the teſtator ſolely, and not by him and *Haſſels* jointly; and iſſue thereon. On the trial a verdict was found for the plaintiff on the two firſt iſſues, and for the defendant on the laſt iſſue; ſo that on the record the plaintiff has a judgment to recover the damages found for him by the jury with coſts. The queſtion made in this caſe does not turn on the ſtat. 4 *Ann. c.* 16. *ſ.* 4 & 5. which allows double pleas, but which does not give to a defendant any right to coſts other than he had before: it muſt therefore be conſidered in the ſame manner as if there had not been any double plea; but as if to a declaration in aſſumpſit the defendant had pleaded ſpecially as to part of the

Where in aſſumpſit the defendant pleaded the general iſſue and the ſtatute of limitations to the whole ſum demanded, and as to part of it that the promiſes were made by the defendant's teſtator and one *A. B. jointly*, which *A. B.* ſurvived the other, and is ſtill living; and this laſt iſſue was found at the trial for the defendant, and the other two iſſues for the plaintiff, who thereupon had judgment for the reſt of his damages and coſts; held that the defendant was not entitled to have the coſts of the iſſue found for her deducted from the coſts of the trial which the plaintiff was entitled to on the iſſues found for him: aliter where all the *iſſues at the trial* are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry.

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plaintiff's demand, and the general iſſue as to the reſidue; and the iſſue as to part had been found for the defendant, and the general iſſue as to the reſidue had been found for the plaintiff. As in the common caſe where the defendant pleads non aſſumpſit as to all but a particular ſum, 5*l.* for inſtance, and as to that ſum a tender; and iſſue on the tender: and on the trial the tender is found for the defendant, but that the ſum tendered was not ſufficient; by which the plaintiff has a verdict on the general iſſue, and judgment for his damages and coſts. In ſuch caſe, which is a common one, the Maſter informs us that there is not an inſtance of the coſts of the iſſue on the plea of tender ever having been taxed for the defendant. The ſtat. of *Glouceſter*, 6 *Ed.* 1. *c.* 1. gives the plaintiff coſts in all caſes where the party is to recover damages. The ſtat. 23 *H.* 8. *c.* 15. gives the defendant coſts in certain actions where the plaintiff after appearance of the defendant is nonſuited, or *verdict paſs by lawful trial* againſt the plaintiff. And the ſtat. 4 *Jac.* 1. *c.* 3. gives the defendant judgment to recover his coſts in any action whatever wherein the plaintiff or demandant might have coſts (in caſe judgment ſhould be given for him), in caſe of the plaintiff being nonſuited, or *verdict* paſſing by any lawful trial againſt him. Many caſes have occurred in which the queſtion has been made both in this court and the Common Pleas, whether a defendant were entitled to any coſts where, there being ſeveral counts in a declaration, the plaintiff has obtained a verdict upon one only: and it has been uniformly holden, that in ſuch caſe coſts ſhall not be taxed for the defendant on ſuch counts as may have been found for him; not only in caſes where the ſubſtantial cauſe of action is the ſame in all the counts, only varied by the manner of ſtating it; ſuch are *Bridges*

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v. *Raymond*, 2 *Black.* 800. *Norris* v. *Waldron*, 2 *Black.* 1199: [Theſe were in *C. B.* In *B. R.* the practice is the ſame, with this difference only, that in *C. B.* they tax coſts for the plaintiff on the whole declaration, as well on the counts on which he ſucceeds as on the counts found for defendant; but here the coſts are taxed for the plaintiff on ſuch counts only on which he obtains a verdict, and no coſts are taxed on the other counts found for defendant:] But alſo in another claſs of caſes which comes nearer to the preſent caſe; viz. where to different counts of a declaration there have been different pleas, and iſſues on thoſe pleas; and one or more found for the plaintiff, and the others for the defendant; in ſuch caſe it has alſo been determined that the defendant ſhall not have coſts taxed on the iſſues found for him. In *Lloyd* v. *Day*, in *C. B.*, *Barnes, qto.* 149. to two counts for different treſpaſſes in different places, the defendant pleaded ſeveral juſtifications; and on trial all the iſſues were found for the defendant, except an iſſue on not guilty to a new aſſignment made by the plaintiff, which was found for the plaintiff; and on argument the Court held that the plaintiff was entitled to 1*d.* damages and 1*d.* coſts, the jury having found the verdict for him with 1*d.* damages; and that the defendant was not entitled to any coſts. Another caſe is mentioned in *Buller's Ni. Pri.* 335. of *Mich.* 4 *Geo.* 3. in *C. B.* In treſpaſs the defendant pleaded three different juſtifications to three different counts, and on iſſue joined had a verdict for him on two, and againſt him on the third: on motion, this was holden not to be a caſe within the ſtat. 4 & 5 *Ann. c.* 16. and that the plaintiff was entitled to coſts on the whole declaration. In *Sir J. Aſtley* v. *Young*, 2 *Burr.* 1232. the declaration conſiſted of two counts; the defendant demurred to one, and

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obtained judgment thereon; and pleaded to the other: and on trial of the iſſue the verdict was for the plaintiff. This was a caſe of ſingle pleas at common law. The Court were all, except Mr. Juſt. *Foſter* who was abſent, unanimous that in the preſent caſe the plaintiff was entitled to coſts upon his verdict, and the defendant to none upon his demurrer: for that the plaintiff, having prevailed upon one of his counts, had a right to have his coſts upon that count, without any deduction on account of the defendant's having gotten judgment upon his demurrer to the other count. *Butcher* v. *Green*, (1ſt edit. *Dougl.* 652. *B. R. E.* 21 *Geo.* 3.) was an action on the caſe, in which the declaration contained one count in trover, and another for words: plea not guilty to the firſt count, and a juſtification to the ſecond count: verdict for the plaintiff on the count in trover, and for the defendant on the other count. The Court held that the defendant ſhould not have coſts taxed on the iſſue found for him. *Buller* J. ſaid, the practice of the Court is uniform not to allow the defendant coſts in caſes of this ſort. From theſe authorities the practice appears to have been ſettled in both courts, that wherever a plaintiff ſucceeds on a trial in any part of his demand divided into different counts in his declaration, whether the defendant have pleaded one plea to all the counts jointly, or pleaded to them ſeparately, and ſeparate iſſues have been joined, on ſome of which he has ſucceeded; yet he has never been allowed coſts on that part of the plaintiff's demand which has been found againſt the plaintiff. And the ſame rule has prevailed where a defendant has ſucceeded on a demurrer as to part of the plaintiff's demand. And it ſeems difficult to make a diſtinction in favour of the defendant, between a caſe where the plaintiff himſelf ſevers his demand by dividing

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it into two counts in his declaration, and where the defendant ſevers it by his plea, as he has done in the preſent caſe. The caſes relied on by the defendant are three late caſes; *Day* v. *Hanks*, 3 *T. R.* 654. 30 *Geo.* 3. *Burrows* v. *Rolls*, *C. B.* 32 *Geo.* 3. and *Griffiths* v. *Davis*, 8 *T. R.* 466. which are diſtinguiſhable from the preſent caſe in this reſpect, that in them *the only iſſue joined was found for the defendant*, and there was *no iſſue* or trial *on which the plaintiff ſucceeded.* For in thoſe caſes the defendant had pleaded to part only of the plaintiff's demand, and let judgment go by default as to the reſidue; and the only iſſue joined, and on which the parties went to trial, was found for the defendant; the plaintiff having ſucceeded only on the inquiry of damages, and the defendant on the trial of the iſſue. On this diſtinction the courts ſeem to have founded themſelves in relieving the defendant from what appeared to them a hardſhip, which by the practice of both courts he was ſubject to in caſes falling within the former deciſions. But as the preſent caſe falls within the former authorities which have been long eſtabliſhed, there having been *ſeparate iſſues joined and tried on different parts of the plaintiff's demand*, on one of which he has obtained a verdict, and does not fall within the laſt claſs of caſes I have mentioned; the defendant not having admitted any part of the plaintiff's demand by letting judgment go by default, but by denying the whole, having compelled him to join iſſue, and go to trial on that iſſue as to part; we are of opinion that the ſettled practice hitherto obſerved muſt prevail in this caſe, and that the defendant is not entitled to have any coſts taxed for her. The conſequence is that

The Rule muſt be diſcharged.

Eſpinaſſe ſhewed cauſe againſt the rule; and

Wigley ſupported it.

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Wednesday, June 6th.

CHARNLEY *againſt* WINSTANLEY and his Wife.

A declared in covenant againſt *B.* and her huſband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award provided it were made during ves. And *A.* proteſting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded* B. to pay *A.* a certain ſum; and then alleged a breach for non-payment of ſuch ſum. After verdict on non eſt factum pleaded; held that upon this declaration it muſt be taken that *B intermarried* after the ſubmiſſion and *before* the *award* made; in which caſe, although the plaintiff could not recover upon the breach aſſigned *for non payment of the ſum awarded*, becauſe *the marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itſelf *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arreſted on the ground that the marriage was a revocation of the arbitrator's authority, and that ſo the plaintiff could not recover *as for a breach by non-performance of the award.*

THE plaintiff declared in covenant, that by indenture under ſeal dated 7th of *December* 1793, between the plaintiff of the firſt part, the defendant *Frances*, by her then name of *Frances Brown* ſpinſter, adminiſtratrix of *John Brown*, of the ſecond part, and *W. R.* of the third part, the plaintiff and the ſaid *Frances* agreed to leave to *W. R.* to collect certain debts of the late partnerſhip between the plaintiff and the defendants' inteſtate, and to ſettle all differences, by leaving to *W. R.* the adjuſtment and final ſettlement of ſuch accounts: they therefore conveyed all the debts and effects of the partnerſhip to *W. R.* the arbitrator. And the plaintiff and the ſaid *Frances* covenanted with each other that they would well and truly obey, *abide* and perform the award of *W. R.* in the premiſes, provided the award ſhould be made during the natural *lives* of the plaintiff and the ſaid *Frances*. The plaintiff then ſtated, that though he had performed his part of the indenture, yet *proteſting* that the defendant *Frances before her intermarriage did not obſerve* and perform, &c., and that the defendants ſince their intermarriage have not obſerved, performed or fulfilled any thing in the ſaid indenture contained on the part of the ſaid *Frances*; he averred, that *after the making of the ſaid indenture and the intermarriage of the defendants*, and during the joint lives of him, the plaintiff, and the ſaid *Frances*, viz. on the 22d of *July* 1803, *W. R.* duly *made his award*

con-

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concerning the premiſes, and awarded the ſaid *Frances* to pay to the plaintiff a certain ſum on the 10th of *Auguſt* then next; of all which premiſes the defendants had notice, &c. The plaintiff then alleged, as a breach, that the defendants did not on the ſaid 10th of *Auguſt*, and after making the award, pay the ſum awarded; contrary to the ſaid indenture and the covenant of the ſaid *Frances*; and ſo the plaintiff ſays, that the defendants have not, nor hath either of them kept with him the covenant of the ſaid *Frances*, although requeſted, &c. To this the defendants pleaded non eſt factum; and after verdict for the plaintiff it was moved in arreſt of judgment, that the marriage of the defendant *Frances* after entering into the covenant to ſubmit to arbitration, and before any award made, was a revocation of the arbitrator's authority, and conſequently there could be no breach of an award which he had no authority to make.

Topping and *Scarlett* ſhewed cauſe againſt the rule, and diſtinguiſhed between the ſubmiſſion of a feme to arbitration by *parol* and by *deed*; *Bro.* tit. *Arbitrement*, 45. *b.* *pl.* 35.; that however her ſubſequent marriage before any award made might be a revocation of the former, it was not of the latter. The anonymous caſe in Sir *W. Jones'* *Rep.* 388., which is the only direct authority in ſupport of the revocation, was probably a ſubmiſſion by *parol*. And though the caſe of *Samin* v. *Norton et Uxor*, which was a ſubmiſſion by bond, may ſeem to be againſt that diſtinction, as reported by *Keble* in his 2d vol. (*a*), yet it appears from the report in the 3d vol. (*b*) of a ſubſequent date, that the Court conceived that the plea of intermarriage before the award made was no anſwer to the action on

(*a*) 2 *Keb.* 865. 877. (*b*) 3 *Keb.* 9.

the

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the bond; and finally the defendants agreed to enter into a new bond. But even admitting the marriage to be a revocation of the arbitrator's authority, though conferred by deed, yet *Vynior*'s case (*c*) is an authority in point to shew that such a revocation by the party's own act is no discharge of her express covenant to *abide* the award; but her having thereby incapacitated herself from *abiding* the award is a breach of such covenant, for which she is liable in this action, her husband being joined for the sake of conformity. [In answer to a doubt started by the Court whether the breach were properly alleged to meet the last view of the case, and whether the breach should not have been specifically assigned that the defendant *Frances* did not *abide* the award, by intermarrying with the other defendant, and thereby incapacitating herself from performing it;] they answered, that though such a breach were not formally assigned, and the declaration might possibly have been bad on special demurrer, yet upon the whole of the count it did sufficiently appear that the defendant *Frances* had not *abided* the award, but had rendered herself incapable of abiding it; and the action is on the deed, and not on the award.

Park and *Richardson*, contrà, relied on *White* v. *Gifford and others*, 1 *Roll. Abr.* 331. tit. *Authoritie*, E. *pl.* 4. as another authority in addition to the case in *W. Jones*, 388. to shew that marriage is a revocation of a prior submission to arbitration by a feme; and said that there was nothing in either of the books to warrant the distinction set up. Then taking that point pro concesso, it cannot in reason be a breach of a covenant, to *abide* an *award*, not to pay a sum of money directed by an award which the arbitrator had

(*c*) 8 Rep. 81. *b.*, and vide 4 *Rep.* 61. *b.*

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no authority to make; and the non-payment of the money is the only breach aſſigned. Suppoſing the fact of marriage before any award made could be deemed a breach of ſuch a covenant, yet it ought to have been ſpecifically aſſigned as a breach, ſo that iſſue might have been taken upon it; but it is not alleged as a *fact*, but merely ſtated collaterally by way of introduction. If meant to have been inſiſted on as a revocation of the authority, it ſhould have been pleaded as ſuch, in the ſame manner as the revocation of the authority was pleaded in *Vynior*'s caſe, in order to ſhew in what manner the defendant had not *abided* by the award. As it now appears, non conſtat that the marriage may not have been with the conſent of the plaintiff, and then it would be no breach. [*Lawrence* J. The only matter put in iſſue was, whether this were the deed of the defendant. If the defendants had meant to inſiſt that the marriage was no breach of the covenant, becauſe had with the conſent of the plaintiff, it was open to them to have pleaded ſuch conſent. There is nothing in the form of the declaration to have ſhut them out of ſuch a plea. Lord *Ellenborough* C. J. There is a ſufficient ſtatement to ſhew the fact of marriage before the award made, and that is primâ facie a breach of the covenant to *abide* the award; becauſe by that act the defendant *Frances* diſabled the arbitrator from making any award. Then if the defendants would inſiſt on any matter to ſhew that the marriage was not a breach, it muſt come from them.] Though marriage operate in law as a countermand to the arbitrator's authority from his inability to bind a feme covert without her huſband by his award; yet the act of marriage, being lawful, is not in itſelf a breach of the covenant; for then ſuch a covenant would operate in reſtraint of marriage generally, extending

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ing as it does to an award made at any time during the lives of the parties, which operation the law will not admit of. *Lowe* v. *Peers* (*a*). [*Lawrence* J. obſerved, that this argument would go the length of ſaying that a woman who covenants when ſingle may always break her covenant with impunity by marrying.]

Lord ELLENBOROUGH C. J. If this had come on upon a ſpecial demurrer as for a defective allegation of the breach of covenant by marrying, there would have been good ground for the defendants' objection to the manner of declaring; for here the breach of covenant ariſing out of the facts ſhewn by the declaration is the fact of the defendants' intermarriage before any award made, by which the defendant *Frances* incapacitated the arbitrator from making any award to bind her, and thereby broke her covenant to *abide* the award of the arbitrator. But the plaintiff not relying on this, proceeds to ſhew by way of breach that the defendant *Frances* did not pay the money awarded after ſuch intermarriage. But notwithſtanding the plaintiff has ſtated his real gravamen informally, yet if upon the whole it appear that the defendant *Frances* has committed a breach of covenant, the judgment cannot be arreſted. Now here the plaintiff, proteſting that the defendant *Frances* did not *before* her intermarriage obſerve her part of the indenture, avers, that *after the making of the indenture, and the intermarriage of the defendants*, the arbitrator made his award. That is a ſufficient allegation of the fact of the marriage being before the award, which conſtitutes a breach of the covenant, to warrant us in giving judgment for the plaintiff on that ground. And this upon the principle, which we had occaſion to

(*a*) 4 *Burr.* 2225.

conſider

conſider very fully in a late caſe (*a*); that however defective the pleadings, and however imperfect the prayer of judgment on either ſide may be, we are bound ex officio to give ſuch a judgment as upon the whole record the law requires us to do.

GROSE J. We cannot arreſt the judgment, if upon the whole record it appears that the defendant has committed a breach of the covenant declared on.

LAWRENCE J. The foundation of the motion to arreſt the judgment is, that it appears that the defendant *Frances* intermarried with the other defendant before the award made, which it is inſiſted amounts to a revocation of the arbitrator's authority; but the marriage itſelf is a breach of the covenant to abide the award; and if the fact relied on ſo far appear as to lay a foundation for the motion, that breach muſt alſo appear on the face of the declaration. It is therefore inconſiſtent in the defendants to ſay that we cannot take notice of the marriage before the award made, which is the ground of the objection to the declaration in arreſt of judgment.

LE BLANC J. declared himſelf of the ſame opinion.

Rule diſcharged.

(*a*) *Le Bret* v. *Papillon*, 4 *Eaſt*, 502.

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Thurſday, June 7th.

DOWLAND *againſt* SLADE and Wife.

The demandant in a writ of right muſt allege in his count that his anceſtor was ſeiſed *of right* as well as that he was ſeiſed in his demeſne as of fee. *Qu.* Whether if one through whom title is derived be improperly ſtated to be *heir* to her brother, who it appears by the record had a ſon who ſurvived him, and through whom title is properly derived, ſuch erroneous appellation of the ſiſter as *heir* to her brother be fatal.

AT the court of the manor and foreſt manor of *Gillingham* in the county of *Dorſet*, holden on the 2d of *May*, 40 *Geo.* 3., *Thomas Dowland* proſecuted his writ of right cloſe againſt *William Slade* and *Elizabeth* his wife, as follows:

"*George* the Third, &c. To Sir *T. Sykes*, Bart. lord of the manor of *Gillingham* in *Dorſetſhire*, or his ſteward of the ſame manor, greeting—We command you, that without delay, and according to the cuſtom of the manor aforeſaid, you do full right to *Thomas Dowland* concerning 18 acres of land, &c. with the appurtenances, in the tything of *Bourton* in the manor aforeſaid, which *William Slade* and *Elizabeth* his wife deforce him of, that we hear no more complaint for want of right. Witneſs ourſelf," &c. And thereupon the ſaid *Thomas Dowland* makes his proteſtation to proſecute the ſame writ in the ſaid Court, in the form and nature of a writ of right patent at the common law according to the cuſtom of the manor aforeſaid; and finds pledges to proſecute, &c. The record then ſet forth the command to the bailiff of the manor to ſummon the defendants on a given day; at which day "*Thomas Dowland* (by his attorney) demands againſt the ſaid *W. S.* and *E.* 18 acres of land, &c. in the tything of *Bourton*, in the manor of *Gillingham*, in the county of *Dorſet*, and within the juriſdiction of this Court; and whereof he ſays that *Thomas Gamlyn* was *ſeiſed in his demeſne as of fee*, according to the cuſtom of the manor aforeſaid, in the time of peace, in the time of the Lord *George* the Second, late King of *G. B.*, &c. and within

60 years

60 years now laſt paſt, by taking the eſplees thereof to the value, &c. and died thereof ſeiſed, leaving one *Elizabeth* his wife him ſurviving, and *from* the ſaid *Thomas Gamlyn* the right to the ſaid tenements with the appurtenances deſcended and came to one *William Gamlyn*, as *brother and heir* of the ſaid *Thomas Gamlyn*, ſubject to the eſtate of free bench of the ſaid *Elizabeth* therein, according to the cuſtom of the manor aforeſaid; and *from* the ſame *William Gamlyn* the right, &c. ſubject, &c. *deſcended* and came to one *Hannah Dowland*, as *eldeſt couſin and heir* of the ſaid *Wm. Gamlyn*, according to the cuſtom, &c. viz. *as eldeſt daughter and heir of* Hannah Ball, who was *the only ſiſter and heir of one other* Thomas Gamlyn, who was *the father as well of the ſaid firſt-mentioned* Thomas Gamlyn *as of the ſaid* Wm. Gamlyn, which ſaid *Elizabeth Gamlyn* died in the lifetime of the ſaid *Hannah Dowland*; and *from* the ſaid *Hannah Dowland* the right, &c. deſcended and came to one *Thomas Dowland*, the ſon and heir of the ſaid *Hannah Dowland*, and from the ſaid *Thomas Dowland*, the ſon of the ſaid *Hannah Dowland*, the right, &c. deſcended and came to the ſaid *Thomas Dowland*, the now demandant, as ſon and heir of the ſaid *Thomas Dowland*, the ſon and heir of the ſaid *Hannah Dowland*; and that this is right he the ſaid *Thomas Dowland*, the now demandant, offers," &c. To this the defendants demurred generally, and judgment was given for the demandant in the manor and foreſt Court, to recover his ſeiſin of the tenements, &c.

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DOWLAND *againſt* SLADE and Wife.

The defendants thereupon proſecuted a writ of falſe judgment returnable in the Court of Common Pleas; and the ſheriff in his return ſtated, that he had recorded the plaint in queſtion, and then ſet out the whole of the proceedings at length, including thoſe before mentioned;

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on which the following cauſes of falſe judgment were aſſigned; 1. That no ſeiſin *of right* of the premiſes is in the count alleged and averred in *Thomas Gamlyn*, who is therein alleged to have been laſt ſeiſed, and from whom the demandant deduces his title; and that the right is in that count alleged to have deſcended to the ſeveral perſons therein named in ſucceſſion from the ſaid *Thomas Gamlyn*, who for aught appears had no *right*; and that the title is attempted to be deduced to the demandant from an anceſtor who is not alleged to have any right, but for aught appears might have been ſeiſed *of wrong*, and the *right* have been in thoſe who were ſeiſed of and held the ſame premiſes ſince the death of the ſaid *Thomas Gamlyn*; and that the root of the demandant's title is defectively and erroneouſly alleged. 2. That ſuppoſing the ſaid *Thomas Gamlyn*, the perſon laſt ſeiſed, to have had any right, no right is deduced from him to the demandant, inaſmuch as the ſaid *Hannah Dowland* is in the ſaid count alleged to be the *heir* of the ſaid *William Gamlyn*, and the right to the premiſes to have deſcended to her as *the heir of* Hannah Ball, which *Hannah Ball* muſt therefore have *died before the ſaid* William Gamlyn, or the ſaid *Hannah Dowland* could not have been *heir to the ſaid* William Gamlyn, or the right have deſcended from the ſaid *William Gamlyn immediately* to the ſaid *Hannah Dowland*; and yet the ſaid *Hannah Ball* is in the ſaid count ſtated to have been the *ſiſter and heir of* Thomas Gamlyn *the father*, who muſt therefore have *died in the lifetime of* Hannah Ball, and to which ſaid *Thomas Gamlyn* the father, *William Gamlyn* the *ſon*, who ſurvived *Hannah Ball*, muſt have been *heir*, and to which ſaid *Thomas Gamlyn* the father *Hannah Ball* never could have been *heir*, if it be true, as there alleged, that *Hannah Dowland* was *heir* to *William Gamlyn* at the time

time of his death, and that the right deſcended immediately from him to her. There was alſo a 3d cauſe of falſe judgment ſtated, (but this was not inſiſted on upon the argument in this Court,) viz. that no cuſtom of the manor is alleged whereby it appears that eldeſt daughters and eldeſt female couſins are entitled to be *heirs* alone and excluſively of their younger ſiſters. The Court of Common Pleas, for the ſecond cauſe above alleged, reverſed the judgment of the Court below; upon which judgment of reverſal a writ of error was brought in this Court, and the common error aſſigned.

This caſe was argued in laſt *Eaſter* term by

Abbott for the plaintiff in error, (the original demandant). As to the 1ſt error aſſigned, that *Thomas Gamlyn*, the anceſtor from whom the demandant derives title, is only ſtated to have been "*ſeiſed in his demeſne as of* fee," without adding, "*and of right;*" theſe words are not neceſſary, (though it was admitted that they are to be found in all the precedents of writs of right) (*a*); for it is not neceſſary to allege any matter in pleading, which cannot be traverſed, and need not be proved; and the tenant cannot admit the *ſeiſin*, and traverſe the *right* to the ſeiſin: and a wrongful ſeiſin is ſufficient to ſuſtain a writ of right. Nor is it neceſſary to allege matter of law; and whether the ſeiſin be of right or of wrong is a queſtion of law and not of fact. Whatever the practice may have been, the neceſſity of it muſt be tried by referring to principles. In caſe for diſturbance of a common way or other

(*a*) The words *et de jure* are omitted in one precedent only, which is in *Reſtal*, tit. *Falſe Judgment*, *pl.* 9. (the precedent which was followed in this caſe); but this was admitted to be a miſtake; for on ſearching the roll, thoſe words were found to be inſerted.

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appurtenant to land, it is uſual to ſay that the plaintiff was *lawfully* poſſeſſed of the land; yet that is not neceſſary. Indictments for murder always ſay, that the deceaſed was "in the peace of God and of our Lord the King," and yet that is not neceſſary to be alleged (*a*). The books which treat of the writ of right only ſay, that it is founded on a *ſeiſin in fee ſimple* of a man or his anceſtors; they do not ſay a *lawful* or *rightful* ſeiſin. *Co. Lit.* 158. It can only bind between the parties. It is called a writ of *right*, not becauſe it is founded only on the right, but becauſe it is adapted to the recovery of it when all other poſſeſſory remedies fail. *Lit. ſ.* 514. ſays, that if the demy mark be not tendered, "the grand aſſize ought to be charged only to inquire of the *mere right*, and not of the *poſſeſſion*," &c. The words, "which he claims as his right and inheritance," are not in any of the precedents of the writs in *Fitzherbert's Nat. Brev.*, or the Regiſter, when directed to lords of manors, but only in the writs in *C. B.*; quia dominus remiſit curiam. The ſtatute of limitations, 32 *H.* 8. *c.* 2. ſpeaks only of *ſeiſin* or *poſſeſſion*, not of *lawful* ſeiſin. And *Lit. ſ.* 478. ſhews, that a wrongful ſeiſin originating in a diſſeiſin is ſufficient to ſuſtain a writ of right; as "if a man be diſſeiſed by an infant who aliens in fee, and the alienee dieth ſeiſed, and his heir entereth, the diſſeiſor being within age, it is in the election of the diſſeiſor to have a writ of *dum fuit infra ætatem*, or a *writ of right*, againſt the heir of the alienee." And this is confirmed by Lord *Coke's Comment*, *Co. Lit.* 278. *b.* The ſubject is reſumed in *ſ.* 481; and in *ſ.* 482 another inſtance is put of a recovery upon a ſeiſin acquired by wrong: "if he in the remainder had entered upon the tenant for life and diſſeiſed him, and after the

(*a*) *Heydon's* caſe, 4 *Rep* 41. *b.*

tenant

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tenant enter upon him, and after the tenant for life by ſuch recovery loſe by default and die, he in remainder may well have a writ of right againſt him which recovers, becauſe the miſe ſhall be joined only upon the mere right, &c., yet in this caſe the ſeiſin of him in the remainder was defeated by the entry of the tenant for life." Upon which Lord *Coke*, (*Co. Lit.* 280. *b.*) obſerves, Here a diſſeiſin gotten by wrong, and defeated by the entry of him that right hath, is ſufficient to maintain a writ of right againſt the recoveror in this caſe." The caſe put by *Littleton* may be the very caſe here. For ſuppoſe *Thomas Gamlyn* the anceſtor, on whoſe ſeiſin the demandant counts to have had a remainder expectant on an eſtate for life, and to have entered on the tenant for life, and thereby acquired a wrongful ſeiſin, and to have been afterwards ouſted by him, and then have died; and then the tenant for life to have died; the count could not properly have been otherwiſe framed than it is. And if the count may be good in any ſuppoſable caſe, no advantage can be taken of it on demurrer or on error. One who has a wrongful ſeiſin may yet have more right than another. To ſhew that the tenant cannot admit the ſeiſin and traverſe the right, he cited *M.* 27 *Ed.* 3. *fo.* 85. *pl.* 26. and *Fitzh. Abr. Droit. pl.* 20. S. C., where *Thorpe*, C. J. ſaid, that the tenant ought to have denied the *ſeiſin*, and not to have acknowledged it; for when he acknowledged that, he acknowledged the right to it *per degrees*. The iſſue in this form of proceeding is only on the right comparatively; for the iſſue is that the demandant has *more* mere *right* than the tenant. And on this iſſue the tenant is to begin, unleſs he tender the demy mark, in order to put the demandant to prove the ſeiſin in the reign alleged in his

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count. There is a record in *Booth's Real Action* (*a*), of the form of the iſſue on a tender of the demy mark; and there the grand aſſize are directed to inquire whether the demandant were *ſeiſed* of the tenement *in dominico ſuo ut de feodo* (not ſaying *et de jure*) tempore dicti domini regis Henrici octavi (*b*). He then referred to various precedents in formedon & juris utrum, the one the writ of right of tenants in tail, *H.* 18 *Ed.* 4. 23. *pl.* 6, and *Bro. Abr. Droit. de Recto, pl.* 33.: the other, the eccleſiaſtical writ of right, *Fitzh. Nat. Brev.* 50. G. (*p.* 116 *ed.* 1755.) where the allegation is only of the *ſeiſin in fee*, and not of the *right*. 1. In formedon, *Raſtal*, tit. *Formedon in Remainder, pl.* 3. *Co. Entr. Formedon in Deſcender, pl.* 5. The donees in tail are only ſaid to have been ſeiſed in dominico ſuo, &c. without the words *de jure*; though their heir is ſtated to be ſeiſed *de jure*. There are ſeparate counts alſo againſt four vouchees in the ſame form. In *ibid. pl.* 10. the feoffees to uſes are not ſaid to be ſeiſed *de jure*; but the heir in tail who entered is ſaid to be ſo ſeiſed. In *Co. Entr. Formedon in Remainder, pl.* 14. neither the donor nor the feoffees to uſes before the ſtatute, nor the ceſtuy que uſe after the ſtatute, are ſaid to be ſeiſed *de jure*. Former proceedings are there ſet out, which have not thoſe words; and the tenant pleads without them as to ſome perſons, though as to others, the words *de jure* are introduced. There is a like precedent, *ib. pl.* 15. and *ib. pl.* 16. in *Reverter*. In *pl.* 18. in *Reverter*, the donor is not ſtated to be ſeiſed *de jure*, though the ſeiſin of the donee is ſo alleged. In *Raſtal's Entr. Formedon, pl.* 5. the donee is firſt ſaid to have been ſeiſed *in dominico ſuo ut de feodo* only, and then to have died

(*a*) P. 102., and vide p. 98., and 1 *Reeves' Hiſt. of Law*, 429.

(*b*) See alſo another ſimilar precedent in *Lit. ſ.* 514.

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seised, &c. feodo *et jure*. In *pl.* 6. the seisin of the donor is alleged without the words *de jure*; that of the donee with them. In ib. *Formedon in descender*, *pl.* 8. the donee is seised *in dominico suo ut de feodo talliato*: but the heir is seised, &c. de feodo *et jure*. In *pl.* 9. both the donee and heir are said to be seised only *in dominico suo ut de feodo talliato*. In *Resceit. in Formedon*, *pl.* 5. the donor is seised in dom. suo ut de feodo, the donee in dom. suo ut de feodo talliato. 2d, In *Juris utrum* the issue is, Whether the demandant have more right to hold in frankalmoigne, or the tenant as his lay fee; and the demandant always counts on some seisin of his predecessors or of his own. In *Co. Entr. Juris utrum*, *pl.* 1. the count is of a *seisin in fee in right of the chantry*: the tenant pleads a gift in tail, and several descents; but neither the seisin of the donor or donee or heir in tail is said to be *de jure*. In *pl.* 2. the demandant alleges seisin in dom. suo ut de feodo *et de jure hospitalis*. In *pl.* 3. it is in dom. suo ut de feodo *et jure ecclesiæ*. In *pl.* 4. it is in dom. suo ut de feodo *et jure, in jure ecclesiæ*: but the verdict only finds the seisin in dom. suo *ut de feodo, in jure ecclesiæ*. In *pl.* 5. the count is the same as in *pl.* 4. In *Rastal's Entr. Juris utrum*, *pl.* 2. it is in dom. suo ut de feodo *et jure in jure ecclesiæ*. *Pl.* 3. states the seisin *ut de jure in jure, ecclesiæ*. *Pl.* 4. in dom. suo ut de feodo *et jure ecclesiæ*. But the tenant pleads a seisin in fee, without saying *de jure*. *Pl.* 5. states the seisin ut de feodo *et jure hospitalis*; *pl.* 6, 7, and 8, ut de feodo *in jure Cantariæ*. The entries, therefore, in *Juris utrum* are in both ways, which shews that the variation is not material. As to the second ground of error, on the repugnance of calling *Hannah Ball* the *heir* of her brother *Thomas Gamlyn* the elder, when it appears that he had a son, *William Gamlyn*, who survived him; if the word

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heir be rejected the deſcent will be well pleaded. But it will be urged that all allegations of title in a writ of right are material and muſt be proved, and that as both the allegation that the right deſcended from *Wm. Gamlyn* to *Hannah Dowland*, and the allegation that *Hannah Ball*, as heir to whom *Hannah Dowland* claims, was the *heir* of her brother *Thomas Gamlyn* the father of the ſaid *Wm. Gamlyn*, cannot by poſſibility be proved, the count is bad for the repugnancy in ſtating the title. The objection, however, ſuppoſes the word *heir* to denote neceſſarily a perſon in whom an eſtate actually veſted by deſcent; but it does not; and if it did, it not being neceſſary to ſtate in terms who was the *heir* of *Thomas Gamlyn* the elder, that word may be rejected as ſurpluſage. It is a general rule in pleading ſo to conſtrue words as to make all the parts conſiſtent if poſſible. The word *heir* is often uſed in pleading to denote the perſon through whom a ſucceſſion or deſcent is derived, and in whom, if living at a certain period, the eſtate would have veſted, but did not veſt. *Co. Entr. Quare Impedit, pl.* 1. *Winch's Entr.* 510. *Formedon in Remainder, ibid. Quare Impedit.* 865. 911. *Co. Entr.* 181. *Droit, pl.* 1. tit. *Formedon, pl.* 18. *Hearne's Pleader, Formedon in Reverter,* 501. *b.*, and *Winch's Entr.* 506. In the two laſt precedents if the count could have been avoided by ſhewing that the brother of the donor was not his *heir* as alleged in the count, it would have been ſufficient to have pleaded that the donees were the daughters of the donor; but in both caſes the plea goes on to ſhew a recovery ſuffered; and in the latter it even appears that one of the daughters died without iſſue before the recovery, by which her moiety veſted in her ſiſter in fee. In the preſent caſe, however, it was ſufficient to have ſhewn that *Hannah Ball* was the

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ſiſter of *Thomas Gamlyn* the elder, without ſaying that ſhe was his *heir:* for it could not have been preſumed that he had any other ſons than thoſe mentioned in the pleadings, or that he had any brother. The general current of authorities omits the word *heir* in ſuch caſes. *Co. Entr. Ejectment, pl.* 6. *fo.* 196. *Quare Impedit, pl.* 12. *fo.* 494. The word *heir* is a term of law; and the repugnance ariſes from attributing to *Hannah Ball* a character *in law* which did not belong to her, not from attributing to her any relationſhip or degree of kindred inconſiſtent with what was before attributed to her, nor in introducing any *fact* to ſhew that a good title could not have been derived through the relationſhip attributed before. Whether from the ſeveral relationſhips ſtated ſhe were *heir* or not to her brother was a mere legal conſequence, upon which no iſſue could have been taken; and it may therefore be rejected as a nugatory allegation of a matter of law, contrary to the facts ſtated, which are ſufficient to entitle the demandant to recover. *French* v. *Wiltſhire, Andr.* 67. *Com. Dig. Pleader,* C. 28, 29. 1 *Ventr.* 119. 1 *Lutw.* 25.

Dampier for the defendants in error, the tenants: 1ſt, The ſeiſin ſhould have been ſtated as de feodo *et jure.* In a proceeding not much in uſe the form of the precedents without one exception (for the precedent in *Raſtal,* tit. *Falſe Judgment, pl.* 9. is found to be defectively ſtated in the book, upon reference to the roll itſelf) is entitled to great weight. Of theſe there are eleven precedents in *Liber Intrationum* (*a*); one in the notes to *Fitz. Nat. Brev.* (*b*), which are by Lord *Hale;* one in *Cro. Car.*

(*a*) 1. *b.*, 2. *a.* & *b.*, 22. 1. *b.*, 107. 130. *b.*, 150. *b.*, 151. *b.*, 95. *b.*

(*b*) P. 1. *n. a.* 1.

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310., five in *Coke's Entr.* (*a*), and seventeen in *Raſtal's Entries* (*b*), in all of which the ſeiſin is ſtated to be de feodo *et de jure*. The precedents in *Formedon* and *Juris utrum* do not apply: neither the tenant in tail in the one, nor the parſon in the other, have the *whole* eſtate in the land in them, which is derived from the donor in tail in the one and the gift in frankalmoigne in the other. The donation or gift, the root and origin of the claim, muſt be ſhewn, and it is not ſufficient merely to ſhew a ſeiſin of the eſtate diſplaced and turned to a right. The iſſue is not on the right. In *Formedon* the iſſue is non dedit. A formedon may be founded on a deviſe. In moſt of the precedents in formedon the ſeiſin of the donor is not ſtated, but merely the gift; except where, as in one precedent in *Coke's Entries*, the *whole* eſtate is claimed in formedon in reverter. But the great majority of the precedents in formedon ſtate the ſeiſin of the eſtate tail to be de feodo *et de jure*. Of ſeventeen precedents in *Coke's Entries*, fourteen are *de jure;* of ſeven in *Winch*, all are *de jure;* of nineteen in *Liber Intrat.* eighteen are *de jure*; and of thirty-two in *Raſtal*, thirty are *de jure;* and in one of the remaining two the perſon laſt ſeiſed in remainder, whoſe eſtate is diſplaced, is ſtated to be ſeiſed *de jure:* and frequently the firſt taker has only an eſtate for life when the ſeiſin de feodo et de jure cannot be ſtated. The three inſtances in *Coke's Entries* where *de jure* is omitted are of eſtates given to uſes before the ſtatute; when the eſtate-tail being given to the feoffees to uſes, and they not having the uſufruct but only the legal eſtate, might be the reaſon why the ſeiſin was not ſtated *de jure*. As to the two paſ-

(*a*) 181. *a.*

(*b*) 241. *b. pl.* 1, 2, 3 5., 244. *b. pl.* 2, 3, 4, 5., 246. *a. pl.* 2, &c. 3, 4, 5, 224. *a. pl.* 1, 2., 130. *b. pl.* 1., 343. *b. pl.* 8, 9, &c., 273. *a. pl.* 8.

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ſages cited from *Littleton*, it may be true that one who has no right may be eſtopped from ſetting up the wrongful ſeiſin of the other, who has a better right againſt him; but it does not follow that the count is not to be in the general form. It may be conſidered in law as a rightful ſeiſin as againſt a wrong-doer who has no right. This objection, however, does not reſt merely on the precedents, but is founded in ſubſtance, on conſidering the nature and object of a writ of right, the iſſue joined in it, and the effects of it. A writ of right is to recover the *whole* eſtate in the land, and to put the demandant in poſſeſſion in full ſeiſin, notwithſtanding any inferior intervening rights, which the tenant or thoſe under whom he claims may have acquired by length of poſſeſſion. It is not therefore unreaſonable that the forms of ſuch a proceeding ſhould be ſtrictly obſerved. The right to lands is divided into the jus poſſeſſionis and the jus proprietatis. The former of which is ſometimes uſed to denote ſuch a right as may be enforced by a poſſeſſory real action; but as applied to a writ of right, the jus poſſeſſionis is immediately conſequent upon the recovery of the jus proprietatis, and the Court enforces it by the writ of ſeiſin upon its being found by the grand aſſize which of the parties has the majus jus. The object therefore is to acquire both; but the point of inquiry is as to the *right*. It is what the demandant in all the precedents aſſerts and claims, and what the tenant denies in terms; it is what the miſe is joined upon, what the grand aſſize is charged with, and what the judgment decides. It would be ſtrange then if the demandant need not claim the land as his *right* and inheritance in the writ, or that the ſeiſin by virtue of which he claims to recover *the right* need not be alleged to be a ſeiſin *of right*, or that he ſhould recover a ſeiſin

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of right which is not alleged to be ſuch; or that that which, for aught appears on the record, was not a ſeiſin *of right* in the anceſtor ſhould become a *right* in the heir, and by this recovery be converted into a ſeiſin of right. The form of the writ of right is given in 1 *Reeves' Hiſt. of Law*, 399. of the count in p. 427, 8., as it is in *Bracton*, and of the plea in p. 475, 6, &c. From thence it appears that the demandant could not have the jus proprietatis unleſs his anceſtor were ſeiſed of the *right* as well as had the poſſeſſion: the ſeiſin of the *right* is therefore a ſubſtantial allegation. If the words *de jure* could ever have been omitted with propriety, it might be expected to be in the caſe of copyholds, where the nature of the tenure veſts the eſtate in the lord, though the tenants by cuſtom have acquired a permanent intereſt and ſeiſin. Yet where a petition in the nature of a writ of right for a copyhold is ſued, the nature of the remedy, which requires the ſeiſin to be ſtated as *of right*, overcomes the difficulty; and the ſeiſin is ſtated to be "in dominico ſuo ut de feodo et de jure *ad voluntatem domini*, ſecundum conſuetudinem manerii," &c. (*a*).

On the ſecond objection, (after premiſing that the court of ancient demeſne where the demurrer was filed was not a court of record, which appeared by the writ of falſe judgment in *C. B.*, and by 4 *Inſt.* 269.; and therefore neither the ſtats. 27 *Eliz. c.* 5. nor the 4 *Ann. c.* 16. extend to it; ſo that it was competent to take any objection to the count which might in a court of record be made on ſpecial demurrer:) he contended, that in all actions by an heir, he muſt ſhew *how* he is *heir* (*b*), and à fortiori in a writ of right (*c*): and if ſo, he muſt ſet out

(*a*) *Co. Entr.* 206. *b. pl.* 10. *Raſtal's Entr.* 130. *b.*

(*b*) 1 *Salk.* 355. and *Hob.* 333.

(*c*) 1 *Reeves' Hiſt. of Law*, 431, 2., and *Bract.* 374., there cited.

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his deſcent formally, and in ſuch a way as to be capable of proof; or it may be ſpecially demurred to. And Mr. *Reeves* (*a*) in his hiſtory, &c. cites *Bracton*, 375. to ſhew that if any one were omitted in the deſcent, or if there were any error in the perſon or the name of any one mentioned in the deſcent, the action abates. Now here it is not diſputed that *Hannah Ball*, through whom the demandant makes title, is improperly ſtated to be the *heir* of *Thomas Gamlyn* the elder, which could not be, as he was her brother, and he had a ſon who, it appears from another part of the count, ſurvived him. If this be ſtated as matter of fact, it is incapable of proof; if as matter of law, it is erroneouſly ſtated. In *Polyblank* v. *Hawkins* (*b*), where the huſband of tenant in fee declared in covenant on a ſeiſin of himſelf *in his demeſne as of freehold in right of his wife*, it was holden bad on ſpecial demurrer; for that he ought to have ſtated that *he and his wife in right of his wife were ſeiſed in their demeſne as of fee*; though the objection there was more critical than in the preſent caſe. None of the precedents referred to e contrà were tried upon ſpecial demurrer. He concluded with referring on this point to the authority of the Court of *C. B.*, who had decided upon the validity of this objection.

Abbott in reply, on the latter point, obſerved as to the caſe of *Polyblank* v. *Hawkins*, that the error there was in ſtating the *ſeiſin*, which was the root of the title. On the firſt point he ſaid, that the miſe was not joined on the poſitive right, but whether the demandant or the tenant had *the better right*, and the verdict and judgment follows the miſe. That the judgment only concludes the two parties on the record, for it is either that the demandant

(*a*) *Reeves' Hiſt. of Law*, p. 432. (*b*) *Dougl.* 328.

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ſhall *hold the land againſt the tenant*, or that the tenant ſhall hold it *quit of the claim of the demandant*. [Upon a queſtion put, whether the tenant might not take the miſe on the *ſeiſin* only,] he anſwered, that that was only done, as he could find, upon tender of the demy mark, to inquire of the ſeiſin of the demandant's anceſtor in the time of the king alleged. But that there was one precedent in *Coke's Entries* (*a*) which runs thus: "Et præd. *J. C.*, &c. per *A. B.* att. ſuum veniunt et defend. pro præd. *R. K.* et *etiam* (which by reference to the roll appears to be a miſprint for *ſeiſinam*) præd. *W. R.* de quo," &c. and prays in aid, &c.

Lord ELLENBOROUGH C. J. in this term delivered judgment.

This was a writ of error brought upon a judgment in the Court of *C. P.* on a writ of falſe judgment returnable in that court, complaining that falſe judgment had been given in the court of the manor and foreſt of *Gillingham*, in a plea of land between theſe parties. The ſheriff in his return to the writ of falſe judgment ſtates, that he had recorded the plaint, and ſets out the proceedings in a writ of right cloſe, and the count founded thereon; and by which *Thomas Dowland* by his attorney demanded againſt *William Slade and Elizabeth his wife*, the defendants in error, certain lands ſituate in the manor of *Gillingham*, in the county of *Dorſet*, and within the juriſdiction of that court, and whereof he ſaid, that *Thomas Gamlyn was ſeiſed in his demeſne as of fee*, according to the cuſtom of the manor aforeſaid: and then derives title by deſcent from *T. Gamlyn* as follows, viz. that from the ſaid *Thomas Gamlyn* the right to theſe tenements deſcended and came

(*a*) 181, *a. pl.* 4.

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to one *William Gamlyn*, as brother and heir of the ſaid *Thomas*, (ſubject to the eſtate of freebench therein according to the cuſtom of the manor of *Elizabeth the wife of the ſaid Thomas*); and that from the ſaid *Wm. Gamlyn* the right to thoſe tenements deſcended and came to one *Hannah Dowland, as eldeſt coũſin and heir of the ſaid William Gamlyn*, that is to ſay, as *eldeſt daughter and heir* of *Hannah Ball, who was the only ſiſter and heir of one other Thomas Gamlyn*, who was the father as well of the firſt-mentioned *T. Gamlyn* as of the ſaid *W. Gamlyn*; (which ſaid *Eliz. Gamlyn* died in the lifetime of the ſaid *Hannah Dowland*); and from the ſaid *H. Dowland* the right to the ſaid tenements with the appurtenances deſcended and came to one *Thomas Dowland*, and from him to the now demandant.

Upon this record two objections have been made to the judgment which has been given in the court baron of the foreſt manor of *Gillingham* for the demandant. The firſt is, that it is not alleged that *T. Gamlyn*, from whom the demandant deduces his title, was ſeiſed "in his demeſne as of fee AND RIGHT;" but only "in his demeſne as of fee," of the lands in queſtion. The ſecond objection is, that in deducing the title from *T. Gamlyn*, the demandant claims through *Hannah Dowland*, who is ſtated to be the heir of *W. Gamlyn*, and that the right deſcended to her, as heir of *Hannah Ball*, who is ſtated to have been the heir of one *Thomas Gamlyn*, the father of *W. Gamlyn*; which could not be; for if *Hannah Dowland* was the heir of *W. Gamlyn*, *Hannah Ball*, (through whom ſhe claims, and *who* is ſtated to be the *heir* of *Thomas Gamlyn* the father) muſt have died before *W. Gamlyn*, in which caſe *he*, and not *Hannah Ball*, muſt have been *the heir* of *Thomas Gamlyn* his father. On this writ of falſe judgment

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ment the Court of Common Pleas reverſed the judgment of the court of the foreſt manor, being clearly of opinion that this *laſt objection* was fatal: and though they did not decide on the firſt objection, they inclined to think that fatal alſo; as all the precedents with the exception of one only contained the above allegation. On this judgment a writ of error having been brought, it has here been argued that the judgment of the Court of Common Pleas is erroneous, for that the allegation, that the anceſtor from whom the demandant claims was ſeiſed AS OF RIGHT, is but matter of form, which may be inſerted in the count or not; for that a writ of right may be maintained on a wrongful ſeiſin, as by an *infant diſſeiſor* againſt his own alienee; that the ſeiſin cannot be admitted and the right denied. And though the iſſue be in this proceeding *formally* on the *right*, yet the tenant, generally ſpeaking, is to begin, and ſhew that he has *more mere* right than the demandant: and though it was admitted that all the precedents of counts in writs of right allege the ſeiſin *de jure*, and that upon further inveſtigation there is not even that ſingle exception, which, when the caſe was argued in the Common Pleas, was ſuppoſed to exiſt; the entry in *Raſtal* by an examination of the roll having been ſince found incorrect; yet, from analogy to counts in *formedon*, and *juris utrum* which are proceedings in the nature of writs of right, where the allegation *de jure* is frequently omitted; it was inſiſted, that the averment that the ſeiſin was *de jure* is but *a form*, not neceſſary to be obſerved. And as to the laſt objection, it has been ſaid, that the count need not have alleged that *Hannah Ball* was *the heir* of *Thomas Gamlyn*, and that word may therefore be rejected, or underſtood only, as a word of pedigree, and as denoting a deſcent mediately through, and not directly and immediately

diately from, that particular anceſtor: or if not, that as a good title is ſtated in fact, the party ſhall not be prejudiced from a miſtake in a legal concluſion from ſuch fact. But notwithſtanding the ingenuity and learning with which this caſe has been argued, we are of opinion that the judgment of the Court of Common Pleas muſt be affirmed; which Court, it may be reaſonably concluded, from what was ſaid by the Chief Juſtice in delivering his opinion, would have decided againſt the plaintiff in error on both points, had it not been ſuppoſed that there exiſted one exception to the univerſality of alleging the ſeiſin of the anceſtor of the demandant to be *of right*: and as it is now found that there is no ſuch exception, it would be too much to conclude that an allegation, which has not been found in any caſe to have been omitted, may or may not be uſed *ad libitum* in a proceeding, the object of which is to decide in favour of that party, *whoſe right* to the lands in diſpute is greateſt. The reference to the 478th ſect. of *Littleton*, from whence it appears, that *an infant diſſeiſor may recover in a writ of right againſt his alienee*, does not ſhew that the form of the count muſt not be as the defendant inſiſts; for as between ſuch parties, the diſſeiſor has *the greater right*; and his ſeiſin, though acquired by wrong, will eſtabliſh a right againſt one who can only claim under the demandant, whoſe alienation on account of his non-age will not be binding. And the analogy from counts on writs of *formedon* and *juris utrum* does not hold; for in them the *mere right* to the lands is not put in iſſue, as in writs of right properly ſo called; for in *formedon* the general iſſue is *non dedit*, that is, the *entail*, not the *mere right* is traverſed: and in *juris utrum* the general iſſue for the tenant is, that *it is his lay fee, and* not *the alms of the church*: (vid. *Booth's Real Actions*, p. 222.

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p. 222. and *Co. Ent.* 400.) But this matter does not reſt merely upon reaſoning; for *Bracton*, in the chapter referred to by Mr. *Reeves* in the paſſage cited at the bar, and in whoſe time actions of this ſort were common, and who muſt have been well acquainted with what was neceſſary to be alleged in counts on writs of right, lays it down expreſsly, that the count muſt allege that the ſeiſin was *de jure*: the paſſage is to be found in *p.* 372. *b.*, where the author having ſtated the form of the count in a writ of right, in which the anceſtor is averred to have been ſeiſed "in dominico ſuo ut de feodo *et jure*," proceeds thus to comment on the count: "Non enim ſufficit ſimpliciter "proponere *intentionem* ſuam (by which word the count is "meant), ſic dicendo, pero tantam terram ut "*jus meum*," "niſi ſic illam fundaverit, quod doceat ad ipſum *jus* per- "tinere, et *per quam viam*, et per *quos gradus jus* ad *ipſum* "*debeat deſcendere*. Item cum agat per breve de recto ad "utrumque jus conſequendum (ſs) tam jus poſſeſſionis "quam proprietatis de ſeiſinâ talis anteceſſoris, non ſuffi- "cit ſi dicat, quòd talis anteceſſor ſuus fuit ſeiſitus in "dominico ſuo ut de libero tenemento tantum, "*vel in* "*dominico ſuo ut de feodo tantum*," niſi doceat quod in do- "minico ſuo ut de feodo, quod ſub ſe continet liberum "tenementum, et totum jus poſſeſſorium, niſi dicat et ad- "jiciat *et jure*, quod ſub ſe continet *jus proprietatis*." And afterwards in page 273. *b.* he adds, "Si autem in "narratione faciendâ *aliquis* articulorum prædictorum "*omittatur*, et narratio a petente advocetur, ita quod error "revocari non poſſit; et petens clameum ſuum pro ſe, et "hæredibus ſuis amittet in perpetuum." The ſame doctrine may be found adopted in *Fleta*, book the 6th, *c.* 16. de Narrationibus, tranſcribed apparently from *Bracton*. Upon theſe authorities we are of opinion, that for the

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firſt objection the count in this caſe is bad; that the judgment of the court baron was falſe; and that the judgment of the Court of Common Pleas muſt be affirmed. And this makes it unneceſſary to ſay any thing as to the ſecond objection, or to examine the many authorities from the entries, which the induſtry and ingenuity of the counſel have brought together on that point.

Judgment affirmed.

REUBEL *againſt* PRESTON.

Thurſday, June 7th.

The Court will quaſh a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form.

THE defendant was arreſted upon a bill of *Middleſex* iſſued the 28th of *May*, *returnable* "*on* Monday *next after the morrow of the* Holy Trinity," inſtead of the uſual return *on* Monday *next after* 8 *days of the* Holy Trinity (*a*).

Nolan obtained a rule for ſetting aſide the proceedings for irregularity, on account of this departure from the ſettled form of returns; againſt which

Marryat ſhewed cauſe, contending that the writ was equally obligatory on the ſheriff where there was a day certain named in the writ for his making his return in term time, in whatever manner it was computed. But

Lord ELLENBOROUGH C. J. ſaid, there was no reaſon for departing from the ſettled form which had been always adopted in deſcribing the return days of the term in writs, though by computation the ſheriff might know as well on what day to make his return. If the regular

(*a*) *Vide* the Table of Terms and Returns, *Tidd*'s Appendix, ch. 2. N.

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known forms were departed from in one inſtance, a thouſand whimſical returns might be framed, and great confuſion introduced.

Per Curiam, Rule abſolute.

Marryat then prayed leave to amend, which was granted.

Friday, June 8th.

WHITE *againſt* JONES, Marſhal of *K. B.* &c.

B. being in cuſtody at the ſuit of *A*, in a joint action againſt *B.* and *C.*, *B.* juſtifies bail in an action intitled by miſtake *A.* againſt *B.* only, and a rule ſo intitled is ſerved on the marſhal of *B. R.*, who thereupon diſcharges *B.* out of cuſtody, he not being charged in cuſtody in any more than one action at the ſuit of *A.*: held that the marſhal was liable in an action for an eſcape.

THE plaintiff declared in caſe againſt the defendant for an eſcape, and ſtated that whereas one *S. Mendel* and *J. O.* were indebted to the plaintiff in 400 *l.*, the plaintiff for recovery thereof proſecuted out of *B. R.* a ſpecial capias ad reſpondendum againſt them, marked for bail, &c. under which *S. M.* was arreſted, and for want of bail was afterwards committed to the cuſtody of the Marſhal, charged with the ſaid action: and then proceeded to charge the Marſhal for voluntarily permitting the ſaid *S. M.* to go at large without the licence of the plaintiff, to his damage, &c. Pleas, 1ſt, Not guilty. 2dly, Actio non, &c. becauſe after the commitment of the ſaid *S. M.* to the defendant's cuſtody a rule of court was made, ordering the ſaid *S. M.* to be *diſcharged* out of the cuſtody of the Marſhal *as to the ſaid action*, by virtue of which rule the defendant diſcharged the ſaid *S. M.*, &c. and upon which iſſue was taken. 3dly, Actio non, &c. becauſe after the commitment of the ſaid *S. M.* to the cuſtody of the defendant a certain rule of court was made, &c. (and then the plea ſet out the tenor of the rule, which was intitled "*White* v. *Mendel*," (omitting the other defendant's name), and ſtated that bail having been

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been put in and juſtified for the defendant, and allowed, the defendant ſhould be diſcharged *as to this action*). By virtue of which rule the defendant as Marſhal afterwards diſcharged the ſaid *S. M.* And then the defendant averred *that the ſaid* S. M. *was not at the making of the ſaid rule, or at any other time in his cuſtody in any action whatſoever, except the ſaid action in the declaration mentioned*, and that *the perſon mentioned in the ſaid rule by the name of* Mendel *is the ſame perſon*, &c.; which diſcharge of the ſaid *S. M.* is the ſame eſcape as that now complained of, &c. Replication, that the bail mentioned in the rule in the laſt plea ſet forth to have been put in and juſtified, were put in for the ſaid *S. M.*, and juſtified *as in an action brought by the plaintiff againſt the ſaid* S. M. *only, and not in the ſaid action ſo brought againſt the ſaid* S. M. *and the ſaid* J. O., as by the record of the recognizance of ſuch bail, &c. appears. And further, that after the making of ſuch rule, and *before* the defendant *diſcharged* the ſaid *S. M.* out of his cuſtody, *the defendant had notice of the ſaid premiſes*. To this there was a general demurrer and joinder.

Wood in ſupport of the demurrer. This was a mere irregularity in the juſtification of bail, which was intitled "*White* againſt *Mendel and another*," inſtead of mentioning the other defendant's name. But whether bail were put in or not, or irregularly put in, it will make no difference as to the Marſhal, who is at any rate bound to obey the rule of the court, and cannot be liable as for an eſcape in ſo doing.

Lord ELLENBOROUGH C. J. It is an unfortunate miſtake, but we cannot help the Marſhal. The rule was to diſcharge the defendant out of cuſtody in one cauſe,

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intitled "*White* againſt *Mendel*," and the Marſhal has diſcharged him in another cauſe, a joint action of *White* againſt *Mendel* and *J. O.*, for which he had no authority. I will aſſume that *Mendel* was only charged in the Marſhal's cuſtody in one cauſe at the ſuit of *White*; but then the rule was nugatory, being intitled in a cauſe of "*White* againſt *Mendel*," and the defendant not being charged in his cuſtody in any ſuch cauſe. The rule therefore did not juſtify him in diſcharging his priſoner in an action to which it did not apply.

The other Judges concurring,

Judgment for the Plaintiff.

Marryat was to have argued for the plaintiff.

Friday, June 8th.

EDGCOMBE *againſt* RODD and Others.

The toleration act, 1 *W. & M.* c. 18 provides (*ſ.* 18.) that any perſon maliciouſly diſturbing any diſſenting congregation under that act, on proof before a juſtice of peace, ſhall find ſureties in 50*l.*, or in default be committed to priſon till the next ſeſſions, and on conviction forfeit 20*l.* to the Crown. To an action againſt magiſtrates for treſpaſs and falſe impriſonment they pleaded a charge preferred before them for an offence againſt that clauſe, and a commitment for want of ſureties under it, to the next ſeſſions; and that before the next ſeſſions it was agreed between the proſecutor and the now plaintiff, *with the conſent* of the committing magiſtrates (the now defendants) that the proſecution ſhould be dropped, and the plaintiff be diſcharged at the ſeſſions for want of proſecution; that the plaintiff was accordingly then and there ſo diſcharged *in full ſatisfaction and diſcharge of the aſſault and impriſonment*: held this was no legal ſatisfaction; for either the agreement was illegal, as ſtifling a proſecution for *a public miſdemeanor*, and thereby impeding the courſe of juſtice; or the ſatisfaction, if any, was moving from the proſecutor only, and not from the juſtices; their authority over the proſecution being at an end after the commitment of the plaintiff, and *their conſent* afterwards to the proſecutor dropping the proſecution being a mere nullity, and no ſatisfaction for a prior injury, if any, received by the plaintiff from their act.

TO treſpaſs for an aſſault and falſe impriſonment, the defendants pleaded, 1ſt, not guilty; 2dly, that the aſſault and impriſonment were by virtue of a warrant under the hands and ſeals of the defendants, three juſtices of the peace for the county of *Cornwall*, granted by them againſt the plaintiff upon a complaint made to them as ſuch juſtices by *C. M.* of a certain miſdemeanor by the ſaid *C. M.* alleged to have been theretofore committed by

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the plaintiff againſt the ſtat. 1 *W.* & *M.* (*c.* 18. *ſ.* 18. the toleration act): whereupon the plaintiff for default of ſuch ſureties as are in that ſtatute expreſſed was committed to the priſon of *Bodmin* in the ſaid county till the next quarter ſeſſions, &c. And afterwards and *before* the ſaid quarter ſeſſions, &c. it was agreed between the plaintiff and *C. M. with the conſent of the defendants*, that *C. M.* ſhould not further proſecute the plaintiff for the ſaid alleged offence, and ſhould conſent to his diſcharge at the then next enſuing quarter ſeſſions, &c. *in full ſatisfaction and diſcharge* of the ſaid aſſault and impriſonment. And then the defendants averred, that at the then next enſuing quarter ſeſſions, &c. (*a*), *C. M.* did not further proſecute the plaintiff for the alleged offence, and *then and there conſented to the plaintiff's diſcharge*; and the plaintiff was by order of the ſame court diſcharged accordingly. And the plaintiff then and there *accepted* C. M.'*s not further proſecuting him* for the ſaid alleged offence, and *his conſent to the plaintiff's diſcharge, and the plaintiff's diſcharge thereon*, in full *ſatisfaction and diſcharge* of the aſſault and impriſonment of the plaintiff. There was a third plea only differing from the laſt in omitting to ſtate the *agreement* before the next quarter ſeſſions after the commitment between the parties, *with the conſent of the juſtices* to drop the proſecution; but only ſtating that at the next quarter ſeſſions after the commitment, the ſaid *C. M.* did not further proſecute the plaintiff for the alleged offence, but conſented to his diſcharge; and that the plaintiff was then and there *diſcharged by order of the ſame Court in full ſatisfaction and diſcharge of the ſaid treſpaſſes, &c. which ſame premiſes the plaintiff then and there accepted in full ſatisfaction and diſcharge of the ſeveral treſ-*

(*a*) One of the defendants was ſtated as one of the juſtices before whom the ſeſſions was holden.

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paſſes, &c. To theſe ſpecial pleas there were demurrers, ſtating, with the common cauſes, theſe ſpecial cauſes, that they did not ſhew with what miſdemeanor the plaintiff was charged by the ſaid complaint, nor whether the complaint were in writing, or upon the oath of *C. M.* or any other perſon; nor for what miſdemeanor the plaintiff was committed.

Burrough, for the plaintiff, ſaid that, without entering into the ſpecial cauſes of demurrer, the pleas were avoided by the ſtat. 1 *W.* & *M. c.* 18. *ſ.* 18. whereby any perſon, guilty of the offence with which the plaintiff was charged before the defendants, "upon proof thereof before any "juſtice of peace by two witneſſes ſhall find two ſure-"ties to be bound by recognizance in 50*l.* and in default "of ſuch ſureties ſhall be committed to priſon, there to "remain till the next quarter ſeſſions; and upon con-"viction of the ſaid offence at the ſaid ſeſſions, ſhall be "liable to the *penalty of* 20l. *to the uſe of the Crown.*" It was not therefore in the power of the proſecutor and the magiſtrates combined together, after the latter had committed the plaintiff to cuſtody for trial for this offence, in default of the ſureties required by the ſtatute, to agree to his diſcharge, as that tended to deprive the crown of its ſecurity for the payment of the penalty, in caſe the plaintiff had been convicted. The firſt of the ſpecial pleas is founded upon an accord and ſatisfaction; but nothing can be pleaded as a ſatisfaction which is not a legal one; and this is not ſo for the reaſon mentioned. But further the conſent of the magiſtrates to the plaintiff's diſcharge was of no conſequence; for having once committed him, they had no longer any control over the proſecution. It was ſtill in the power of the proſecutor to go on with the proſecution, though againſt the conſent

of the magiſtrates. The defence is not put upon the ground that the proſecutor and the magiſtrates had been guilty of a joint treſpaſs againſt the plaintiff, and that the latter had accepted ſatisfaction from one of them on account of ſuch treſpaſs, which might have been pleaded as accord and ſatisfaction. Neither is it to be compared to the diſcretionary power ſometimes exerciſed by this Court upon application for an information, which in the exerciſe of their lawful diſcretion to grant or refuſe it, they will ſometimes, to prevent oppreſſion, make it part of the terms of granting it, that the party applying ſhall not bring any action for the ſame injury, or ſhall diſmiſs his action, if brought. For this Court have a legal control over proceedings inſtituted by their authority, and may ſtay the further proſecution of them if they ſee juſt cauſe for it. But juſtices of peace have no ſuch diſcretionary power veſted in them by law. Then the ſecond ſpecial plea ſtands on the ſame foot; it is entire, and the *ſatisfaction* which is part of it, cannot be ſtruck out. (This was admitted è contrà). If it could, the ſpecial cauſes of demurrer would apply.

Dampier contrà. There is nothing illegal in parties compromiſing a *miſdemeanor*. In *Johnſon* v. *Ogilby* (*a*), Lord Chancellor doubted whether an agreement, the object of which was to get rid of a criminal proſecution for a fraud, could be enforced in equity: but it being anſwered at the bar that this was different from the caſe of compounding a felony; and that where the indictment was for a fraud, and the party injured agreed to accept ſatisfaction, as in conſcience he ought; this was lawful, and the fraud was cognizable and relievable as well in equity as at law. Wherefore the objection was no fur-

(*a*) 3 *P. Wms.* 279.

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ther inſiſted on. [Lord *Ellenborough*, C. J. Is is not illegal to compound a proſecution for perjury? The caſe of *Collins* v. *Blantern* (*a*) proceeded on that ground; where a bond given to ſecure an agreement for that purpoſe was holden to be void.] That was given as a *bribe* to ſtifle the proſecution, which admits of a different conſideration. If theſe defendants had done any thing illegal, or had acted from corrupt motives in ſtopping the proſecution, they could not have ſet up the agreement as a defence. And as to the right of the Crown being defeated, no forfeiture could veſt in the Crown before conviction, and till conviction every perſon is to be preſumed innocent. But whatever right might have veſted in the Crown, nothing which the magiſtrates did could defeat it; but it was ſtill competent to the Crown to have proceeded for the penalty. [Lord *Ellenborough* C. J. Has not the law required, for the preſervation of the public peace and the protection of perſons conforming to the toleration act, that thoſe who are charged before the magiſtrates on ſatisfactory evidence of a breach of that law ſhould find ſureties, or be impriſoned till the next ſeſſions?] Here the plaintiff was impriſoned *till* the next ſeſſions; and therefore the public had the ſecurity required. But it does not follow, though there might be juſt ground for the commitment, that there was ſufficient to convict the accuſed: as two witneſſes are required to juſtify the commitment, it ſeems to follow that the offence muſt be eſtabliſhed at the trial by the ſame number, and one of the witneſſes might have died in the interval. So matter of defence may be brought forward to warrant an acquittal on the merits. The agreement was that *Marſhal* would not proſecute the plaintiff at the ſeſſions; that was a benefit as far as it went to the plain-

(*a*) 2 *Wilſ.* 341—9.

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tiff, though another might proſecute: and any conſideration, however ſlight, is ſufficient to uphold an agreement. *Comber* v. *Wane* (*a*), (which has been doubted (*b*), is the only caſe which ſays, it muſt be a *reaſonable* ſatisfaction: But the true rule is laid down in *Andrew* v. *Boughey* (*c*), where one declared upon an agreement for the delivery of 400 lbs. of good wax, and a breach by delivery of 373 lbs. of bad wax; to which the defendant pleaded that 20 lbs. of wax had been given and accepted in ſatisfaction: and this was holden to be a good bar; for, though it were not of one hundredth part of the value of the plaintiff's loſs, yet *by his own accord and agreement*, and his *acceptance* of the wax, this injury was diſpenſed with. Here *Marſhal*, having in the firſt inſtance ſubmitted his complaint to the defendants, would not have acted properly in compromiſing the proſecution without their conſent; ſuch conſent therefore was a conſideration moving from them. And when the party injured and the accuſed were ſatisfied that the proſecution ſhould drop with the conſent of the magiſtrates, there was no more illegality in ſuch a tranſaction than when the ſame thing is done by the conſent of this Court, which is in common experience in caſes of perſonal miſdemeanors. [*Lawrence* J. aſked what *act* the *magiſtrates* had done which was to be taken as a ſatisfaction to the plaintiff for the injury received? For their *conſent* that *Marſhal* ſhould not proſecute was a mere nullity.] It is not neceſſary that the ſatisfaction ſhould move from the party whoſe treſpaſs is ſatisfied: a man's friends may bargain for him; and if the party injured accept any thing in ſatisfaction of the treſpaſs from a ſtranger, it is ſuffi-

(*a*) 1 *Stra.* 426. (*b*) Sed vide *Fitch* v. *Sutton*, ante, 230.
(*c*) *Dy.* 75. *a.*

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cient. [*Lawrence* J. It was holden in *Grymes* v. *Blofield* (*a*), in an action of debt on an obligation for 20*l.* that a ſurrender of a copyhold by *J. S.* (a ſtranger) to the uſe of the plaintiff in ſatisfaction of the 20*l.* which the plaintiff *accepted*, was no good plea.] That caſe is mentioned in 1 *Com. Dig.* 107. as having been ruled by *two* juſtices; ſeemingly therefore with *doubt*. [*Laurence* J. No doubt is ſuggeſted either in the Digeſt or in the Report. And the caſe which came on twice in court was ſanctioned altogether by the opinions of *three* of the Judges, the fourth not being preſent on either occaſion.] At any rate it is an anomalous caſe. And it might have been a mere *voluntary* interpoſition of the ſtranger; for it is not ſaid that he ſurrendered the copyhold at the requeſt of the obligor.

Burrough in reply. The conſent of the juſtices to the plaintiff's diſcharge was a mere nullity; for after they had committed him for want of ſureties for trial, they were functi officio. The ſtatute of *William* having given the penalty to the Crown is deciſive of this caſe: and it is not neceſſary to conſider what difference it would have made if the whole penalty had been given to the proſecutor. If the plaintiff would have been convicted, if the proſecution had not been abandoned, then public juſtice

(*a*) *Cro. Eliz.* 541. This caſe is reported amongſt the caſes of *Hil.* 39 *Eliz.*, but it is noted at the beginning of the caſe as of *Trin.* 36 *Eliz.*, and it is ſaid in the report to have been *afterwards* in *Eaſter Term* 31 *Eliz.*, (which muſt be a miſtake in the print) adjudged for the *plaintiff*. But in *Rol. Abr.* 471. this account is given of it: "If the condition of an obligation be to pay 20*l.* at a certain day, and a *ſtranger* ſurrender a copyhold to the uſe of the obligee in ſatisfaction of the 20*l.* which the obligee accepts; this is *a good ſatisfaction and diſcharge of the obligation. Trin.* 39 *Eliz. B. R. inter Grimes* and *Blofield.*"

has

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has been defeated, and the Crown deprived of the penalty in conſequence of this agreement: If on the other hand, the plaintiff would have been acquitted, then there has been no conſideration for his agreement to forbear his remedy. In either caſe the plea is bad, as founded either on an illegal agreement or on a nudum pactum. The caſe of *Collins* v. *Blantern* (*a*) went on the ground that the compromiſe of the proſecution was illegal. There is no ground for ſaying that two witneſſes were required in order to convict; and if the death of witneſſes was the reaſon for dropping the proſecution, it ſhould have been ſo ſtated, and the plea ſhould have taken another form.

Lord ELLENBOROUGH C. J. The pleas are bad at any rate; whether on the ground ſtated in the caſe of *Grymes* v. *Bloſield*, which has been mentioned, that the ſatisfaction, if any, proceeded ſolely from a ſtranger, for ſo *Marſhal* muſt be taken to be as to theſe defendants; or upon the ground which has been principally relied on at the bar, that this was an illegal agreement, and no conſideration for it could ariſe to the plaintiff out of the acts of the defendants. The toleration act in order to protect religious congregations in the exerciſe of their worſhip, has annexed a penalty of 20*l.* on perſons guilty of diſturbing them; and, in order to ſecure the public in the interval between the commiſſion of the offence and the trial of the offender, it has required the magiſtrate before whom the complaint is lodged, to take ſecurity from the offender, or in default of giving ſuch ſecurity, to commit him to the next ſeſſions. Then, inſtead of abiding the time of his delivery, when he ſhould be diſcharged in due courſe after trial, in caſe he eſtabliſhed his innocence, he ſtipulates with the proſecutor and the com-

(*a*) 2 *Wiſ.* 341.

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committing magiſtrates that the proſecution ſhall be dropped, and that he ſhall be diſcharged for want of proſecution. Such an agreement has a tendency to produce impunity for the commiſſion of the offence which the Legiſlature meant to prevent; it ſtops the means of the Crown to recover the penalty of 20*l.* in caſe the plaintiff had been proſecuted and found guilty. In *Collins* v. *Blantern* an agreement to put an end to a proſecution for a miſdemeanor, was conſidered to be illegal, as impeding the courſe of public juſtice. And this produced the ſame miſchief.

GROSE, J. The facts ſtated cannot amount to a *legal* ſatisfaction of the treſpaſs in this caſe; for the agreement ſtipulating for the plaintiff's diſcharge for want of proſecution, was illegal and void. Put the caſe that the plaintiff was guilty; then public juſtice has been defeated, and the agreement was illegal. But if he were innocent; then he would have been entitled by law to his diſcharge; and the defendants having only conſented to that which by law he was entitled to have, have made him no *ſatisfaction*.

LAWRENCE J. I hold theſe pleas to be bad on the ground of there being no *ſatisfaction* ſhewn in them. If the plaintiff were guilty, the proſecution ought to have been proceeded on, and the defendants can claim no benefit from any thing they may have done to prevent it. The juſtice of the country has been defeated. But if the plaintiff were not guilty, what *benefit* can he be ſaid to have received from the defendants in ſatisfaction of the wrong he has received? The juſtices having committed him to cuſtody, as it now appears without any ground for it,

they only agreed that they would not add injury to injury by conſenting that the proſecutor ſhould not go on with an unfounded proſecution. But what ſatisfaction is there in that for the injury already received? Then if the caſe in *Cro. Eliz.* be law, the pleas are bad on another ground, that ſatisfaction from a ſtranger is no ſatisfaction in law. Lord C. B. *Comyns* does not appear to doubt the caſe by his manner of ſtating it; for having firſt ſtated inſtances of accord and ſatisfaction which are good pleas, he next ſtates thoſe that are not good; amongſt which latter the caſe in queſtion is claſſed; and he himſelf expreſſes no diſſatisfaction with it.

LE BLANC, J. The pleas cannot be ſupported on the grounds ſtated. The ſatisfaction, if any, moved altogether from *Marſhal* the proſecutor. The juſtices by merely conſenting to *Marſhal*'s dropping the proſecution, did nothing for the benefit of the plaintiff. This it muſt be remembered was a proſecution for a *public miſdemeanor*, and not for any private injury to the proſecutor. If then the plaintiff had been rightly committed by the magiſtrates, they ſhould have taken no part in any bargaining whether the proſecution were to go on or not. If the plaintiff had acted illegally in what he had done, there could be no legal conſideration for ſuch an agreement in their conſenting to ſtop the proſecution. And if he had not acted illegally, then their conſenting to *Marſhal*'s dropping an illegal proſecution, to which their conſent was not neceſſary, would be no conſideration to the plaintiff for giving up any right of action he might have againſt the defendants for the part they had before taken in the tranſaction.

Judgment for the plaintiff.

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Friday, June 8th.

The KING *againſt* OSMER.

An indictment for an aſſault, falſe impriſonment, and reſcue, ſtated that the Judges of *the Court* of Record *of the town and county*, &c. of *P.* iſſued their writ, directed to *T. B.*, one of *the ſerjeants at mace of the ſaid town and county*, to arreſt *W.*, by virtue of which *T. B.* was proceeding to arreſt *W. within the juriſdiction of the ſaid court*, but that the defendant aſſaulted *T. B. in the due execution of his office*, and prevented the arreſt: held ſuch indictment bad; it not appearing that *T. B.* was *an officer of the court*: and that there could not be judgment after a *general* verdict on ſuch a count as for a common aſſault and falſe impriſonment; becauſe the jury muſt be taken to have found that the aſſault and impriſonment was for the cauſe therein ſtated, which cauſe appears to have been that the officer was attempting to make an illegal arreſt of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it.

THE ſecond count of the indictment ſtated, that the mayor and ſenior bailiff of the town and county of the town of *Poole*, the judges of the weekly court of record of the ſaid town and county, by their writ iſſued out of the ſaid court, dated 14th *July*, 43 *G.* 3., directed to *W. C.* and *T. Brown*, *ſerjeants at mace of the ſaid town and county*, did command them to take *B. Willis*, if he ſhould be found in their bailiwick, and keep him ſafely, &c. ſo that they might have his body before the mayor, &c. on, &c. to anſwer *J. S.* in a plea of treſpaſs on the caſe, which ſame writ, on, &c. at, &c. within the juriſdiction of the ſaid court, was delivered to the ſaid *T. Brown*, *one of the ſerjeants at mace of the ſaid town and county*, to be executed in due form of law: by virtue of which ſaid writ the ſaid *T. B.* afterwards, &c. on, &c. at, &c. at the town and county aforeſaid, and *within the juriſdiction of the court* aforeſaid, was proceeding to arreſt the ſaid *B. W.* according to the exigency of the ſaid writ. And that the defendant, with others unknown, afterwards, &c. in the town and county aforeſaid, and within the juriſdiction of the ſaid court, in and upon the ſaid *T. B.*, then and there being one of the ſerjeants at mace aforeſaid, and *in the due execution of his ſaid office*, did make an *aſſault*, and did alſo *impriſon* him, &c.; and that the defendant and the ſaid others unknown, with force and arms, &c. did violently prevent the ſaid *T. B.* from arreſting the ſaid *B. W.*, as by the ſame writ he was commanded, &c. After verdict

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for the crown, it was moved to arreſt the judgment, 1ſt, becauſe it did not appear that the writ ſet forth in the indictment was one under which *Willis* could legally have been arreſted. For by the ſtat. 12 *Geo.* 1. *c.* 29. extended to inferior courts by ſtat. 19 *Geo.* 3. *c.* 70., where the cauſe of action ſhall not amount to 10 *l.* the plaintiff ſhall not arreſt the body of the defendant, but merely ſerve him perſonally within the juriſdiction with a copy of the proceſs; and where the cauſe of action ſhall amount to 10 *l.* or upwards, an affidavit of the debt ſhall be made, "and the ſum ſpecified in ſuch affidavit *ſhall be indorſed on the back of the writ*, for which ſum ſo indorſed the officer to whom the writ ſhall be directed ſhall take bail," &c. And "if no ſuch affidavit *and indorſement* ſhall be made, the plaintiff ſhall not proceed to arreſt the body of the defendant," but ſhall proceed as before directed in caſes where the cauſe of action is under 10 *l.* 2dly, It was objected, that it did not appear that *Brown* was a legal officer of the *court* out of which the writ iſſued, or that he had authority to execute it. He is only alleged to be "ſerjeant at mace *of the ſaid town and county*."

Jekyll and *A. Moore* now ſhewed cauſe, and in anſwer to the firſt objection cited *Whiſkard* v. *Wilder* (*a*), where upon demurrer to a declaration on a bail bond, becauſe it did not ſet forth that the debt was ſworn to by the plaintiff and the ſum ſworn to marked on the writ, and ſo no authority appeared to *arreſt* the defendant; it was holden not to be neceſſary; and that the ſtat. 12 *Geo.* 1. was merely directory to the ſheriff, who is anſwerable for the omiſſion if he proceed to arreſt upon ſuch a writ: but that the proceſs was not thereby avoided, and the arreſt

(*a*) 1 *Burr.* 330.

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was ſtill good. Beſides, this part of the count is merely inducement to the obſtruction, which is the giſt of the charge. As in *R.* v. *Wright* (*a*), where in an indictment for ſuffering two perſons to eſcape who were committed by juſtices of peace for a forcible entry, againſt the ſtat. 8 *H.* 6. it was objected, that the indictment did not ſet forth the manner of the commitment, nor even allege generally that it was *debito aut legitimo modo*: yet it was holden well enough, being but inducement to the offence. But at any rate, it being afterwards ſtated in this indictment that *Brown* was proceeding to arreſt *Willis* "*according to the exigency of the writ*," and that the aſſault was made upon him "*in the due execution of his ſaid office*," it muſt be intended that he had a lawful writ to authoriſe an arreſt; according to *Hart*'s caſe (*b*), where becauſe in an indictment for a reſcue it was ſtated, that *by virtue of a plaint* before ſuch a ſheriff the party was *lawfully arreſted*, it was intended that the officer had a good warrant. As to the 2d objection, that the officer is not ſufficiently deſcribed to be an officer *of the court*; he is ſtated to be the ſerjeant at mace of the *town and county*, which muſt be coextenſive with the juriſdiction of the court, deſcribed to be "the weekly court of record *of the ſaid town and county*," as in *Long*'s caſe (*c*). And it is afterwards ſtated that *Brown* was proceeding to arreſt *Willis within the juriſdiction of the court*, and that he was aſſaulted *in the due execution of his office*. The *ſerjeant at mace* of the *town and county* muſt ex vi termini be taken to be the proper officer to execute the proceſs of the court of record *of the ſaid town and county*: admitting that according to *Grant* v. *Bogge* (*d*), one who is not the proper officer of a court

(*a*) 1 *Ventr.* 169.
(*b*) *Cro. Jac.* 473.
(*c*) 5 *Rep.* 121.
(*d*) 3 *Eaſt*, 128.

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cannot juſtify an arreſt under a writ directed to him for that purpoſe. [Lord *Ellenborough* C. J. If *Brown* had been ſtated to be the ſerjeant at mace *of the court*, there might have been more ground for intending that he was the proper officer of the court to execute its proceſs; but we can intend nothing to this purpoſe from the allegation that he was the "ſerjeant at mace *of the town and county*." I do not ſee how this objection can be anſwered. *Lawrence* J. A ſerjeant at mace ex vi termini means no more than one who carries a mace for ſomebody; but for whom does not appear in this caſe.] It is incident to every court to appoint its own officer to execute its proceſs, unleſs ſome ſpecial officer be appointed by the common law, or the peculiar conſtitution of the particular court. 1 *Rol. Abr.* 526. F. *pl.* 1. And any act deſignating an individual to execute its proceſs is an appointment. And it will not be intended that the court at *Pool* did not know their proper officer. In *Raſtal's Entr.* 167. there is a precedent of a writ iſſued miniſtro curiæ, but not ſtated *ibidem*, nor that he had the execution of proceſs. [Lord *Ellenborough*. *Miniſtro curiæ* implies that he was the officer of the court at the time.] At all events ſufficient appears on the face of the count to ſuſtain the judgment as for a common *aſſault*, or at leaſt for an impriſonment, which latter is not juſtified, however illegal the arreſt may appear to be. As in *Pallant* v. *Roll* (*a*), where in treſpaſs for hunting, laid upon the ſtat. 4 & 5 *W.* & *M.* againſt the defendant as a *diſſolute* perſon, &c.; though the plaintiff failed in proving the ſpecial circumſtances under the ſtatute, yet held he might recover as for a common treſpaſs.

(*a*) 2 *Blac. Rep.* 900.

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Lord ELLENBOROUGH C. J. Though the jury in finding the defendant guilty generally upon the ſecond count muſt neceſſarily have included the aſſault; yet finding as they do the whole count, we muſt take it that they found the aſſault committed under the circumſtances charged in that count. Which brings the caſe back to the objection which I before ſtated to be deciſive, that *Brown* is not ſtated to be an officer *of the court*, and conſequently no authority is ſhewn for his making the arreſt. Proceſs ought always to be directed to a proper known officer; otherwiſe, if it may be directed to any ſtranger, it might be reſiſted for want of knowledge that the party is an officer of the court. Then taking the whole count together, the jury in effect find that there was an aſſault and impriſonment, but committed under circumſtances which juſtified the defendant. For if a man without authority attempt to arreſt another illegally, it is a breach of the peace, and any other perſon may lawfully interfere to prevent it, doing no more than is neceſſary for that purpoſe; and nothing further appears in this caſe to have been done.

The other Judges agreed.

Judgment arreſted.

Gibbs, *Lens* Serjt., *Dampier*, and *Jervis* were to have ſupported the rule.

The KING *againſt* The Inhabitants of KEYNSHAM.

Saturday, June 9th.

THE pauper *Thomas Moſs*, being legally ſettled by birth at *Keynſham*, in the month of *October* 1791, was bound apprentice for 7 years to *Joſeph Cromwell*, who reſided at *Bath*. The ſum of five guineas was agreed to be paid by the father to the maſter as a premium, and was the ſum inſerted in the indenture. But the only ſum which appeared to have been paid was the ſum of four guineas, which was paid at the time of dating and executing the indenture. The Seſſions, on appeal, conſidering the indenture as void under the ſtat. 8 *Ann. c.* 9. confirmed the original order of juſtices, by which the pauper, his wife and child, had been removed from the pariſh of *Weſtwood* in the county of *Wilts* to the pariſh of *Keynſham* in the county of *Somerſet*. It was admitted on the argument of the caſe, that the duty had been paid on the ſum *contracted for*.

Where a ſum agreed to be given with an apprentice was 5 guineas, which was inſerted in the indenture, and the duty paid accordingly, by ſtat. 8 *Ann. c* 9. held well, tho' in fact only 4 guineas were paid; for the *full ſum received, given, paid, agreed or contracted for*, as required by the act, was inſerted, and the duty paid for it, and the ſtamp uſed was of the ſame deſcription and the duty appropriated to the ſame fund as if 4 guineas only had been inſerted and paid for, ſuppoſing that would have ſufficed.

Coſberd, in ſupport of the orders, inſiſted that the indenture was void under the 35th and 39th ſections of the ſtat. 8 *Ann. c.* 9.; for the proviſions of the ſtatute were not ſatisfied merely by inſerting in the indenture the ſum *contracted* for; but the ſum *actually paid* ſhould have been ſtated, and the ſtamp proportioned accordingly. The ſeveral words uſed in the act, namely, "ſum or ſums *received*, or in any wiſe directly or indirectly *given*, *paid*, *agreed*, or *contracted for* with any apprentice," were inſerted for the purpoſe of embracing every poſſible caſe, and were to be conſidered diſtributively, with reference to the particular nature of the tranſaction at the time of executing the indenture. Thus if the contract at that time

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were as far as regarded the premium *executory*, it was neceſſary to inſert in the indenture the ſum which was *agreed* or *contracted for*: and to that contingency thoſe words in the act were meant to apply: but if the premium were actually *paid* at the time of executing the indenture, then *the ſum paid* ſhould be the ſum ſtated; to meet which latter event the words *received*, *given*, and *paid* were included in the ſtatute. To put a different conſtruction on the act would be to give an option to the maſter to inſert either the ſum agreed for or the ſum paid; and in caſes, the reverſe of the preſent, where the ſum contracted for might be leſs than the ſum actually paid, an evaſion of the duty impoſed by that act, in conſequence of ſuch a ſuppoſed direction, might be practiſed. If this conſtruction were juſt, it was no anſwer to the objection that a larger ſum than that paid was in this caſe inſerted in the indenture. Both the 35th and 39th ſections require that the ſum ſhould be *truly* inſerted: and if a different, though a larger, ſum were mentioned, it could not be contended that the words of the ſtatute were complied with. In *Farr* v. *Price* (*a*) the Court held that a ſtamp of greater value than that required invalidated a promiſſory note, though it were applicable to the ſame kind of inſtrument; and the ſame reaſoning applies to this caſe, in which it may as well be urged that the letter of the ſtatute of *Anne* ſhould be ſtrictly obſerved, and that no other than the preciſe ſum paid ſhould be ſtated in the indenture.

Jekyll, contrà, was ſtopped by the Court.

GROSE J. (*b*) In conſtruing the act of parliament, we muſt attend to the intention of the Legiſlature, which

(*a*) 1 *Eaſt*, 55. (*b*) Lord *Ellenborough* C. J. was abſent at *Guildhall*.

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was to raiſe a revenue by the payment of certain duties upon indentures of apprenticeſhip, &c. and to take care that the public were not defrauded of the fair duty. For this purpoſe the act requires (ſ. 35.) "that the *full ſum* "of money *Received*, or in anywiſe directly or indirectly "given, paid, agreed, or contracted for," with the apprentice, "ſhall be *truly inſerted* in words at length" in the indenture, &c. under a certain penalty; and then the ſubſequent clauſe (ſ. 39.) avoids the indenture "if the "ſum received, given, paid, ſecured, or contracted for" be not ſo truly inſerted. Now by requiring the *full ſum* to be inſerted, it meant that *not leſs* than the ſum upon which the duty was really payable ſhould be inſerted: and here not only the *full ſum*, but in truth *more* than the ſum for which the duty was payable has been inſerted, and the duty paid upon ſuch larger ſum. There has therefore been no fraud upon the public, but the whole which the act required, and even more, has been complied with: and therefore there is no ground for the objection.

LAWRENCE J. Even ſuppoſing that the exact ſum which the maſter had contracted for and was entitled to receive with the apprentice were required by the act to be inſerted, ſtill the objection would not hold in this caſe. For it appears that five guineas, which is the ſum inſerted in the indenture, was the ſum *contracted* for; and though the maſter has in fact only received four guineas, yet I know no reaſon why he may not recover the remainder in an action. The objection would have been more plauſible if four guineas only had been inſerted in the indenture, and the duty paid upon that. Taking it however that the four guineas only, which have been in fact received by the maſter, were all he was to have, ſtill the words of the act

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have been complied with, requiring the *full ſum* paid to be inſerted; for here the *full ſum* paid and more has been inſerted, and the duty paid upon it. The caſe of *Parr* v. *Price* does not apply; becauſe there the ſtamp uſed was one appropriated to notes of a higher denomination. The ſtamp duties raiſed by different acts on different inſtruments are appropriated to the payment of the intereſt of different funds; and if the proper ſtamp appropriated to the ſpecific inſtrument were not made uſe of, though an equal or higher ſtamp, intended for a different inſtrument, were uſed, the intereſt of the fund might turn out deficient for which the duty was impoſed. In that caſe the ſtamp uſed was not the ſtamp required by the act of parliament for a note of that amount. But no ſuch objection ariſes here: the duty impoſed, whether more or leſs in the particular inſtance, is all applicable to one fund, and the ſame deſcription of ſtamps is required.

LE BLANC J. If the act is to be conſtrued according to the intention of the Legiſlature, it is clear that ſuch intention has been complied with in this caſe; and if we look to the words of the act, they will be equally ſatisfied by what has been done. The intention of the Legiſlature was to raiſe a ſtamp duty in proportion to the ſum paid with the apprentice. For which purpoſe they have required, by *ſ.* 35. that the *full ſum* received or in anywiſe given, paid, agreed or contracted for ſhall be inſerted; and by *ſ.* 39. the indenture is avoided in which ſhall not be inſerted the full ſum received, or given, paid, ſecured, or contracted for, "or whereon the duties payable by this "act ſhall not be duly paid, &c. according to the tenor "and true meaning of this act." Now the *full ſum*, according to the tenor and true meaning of the act, has been

inſerted; and the *proper ſtamp* appropriated to this deſcription of inſtruments has been uſed; which differs this from the caſe cited.

Orders quaſhed (*a*).

(*a*) Vide *Taylor* v *Hague*, 2 *Eaſt*, 414 S P.

FLEMING, qui tam, *againſt* BAILEY.

Monday, June 11th.

THE declaration, which was framed on the ſtat. 39 *Geo* 3. *c.* 79, ſtated that the defendant was *indebted* to the plaintiff in 60*l.* and then contained three counts, in each of which the plaintiff went for a penalty of 20*l.* under the ſtatute, for printing a certain paper meant to be publiſhed and diſperſed, and omitting the printer's name and place of abode, as required by *ſ.* 27. After verdict for the plaintiff,

The ſtat. 39 *G* 3. *c* 79 giving a penalty of 20*l.* for printing papers to be publiſhed without adding the printer's name and place of abode, directs that any penalty impoſed by the act *exceeding* 20*l* may be ſued for in the courts at *Weſtminſter*, and any penalty not exceeding 20*l* *ſhall and may* be recovered before any juſtice of peace: but it alſo gives in the ſame clauſe a form of declaration for recovering 20*l.* in the courts of *Weſtminſter* Yet held that a common informer cannot ſue for a penalty of 20*l.* in this court, no ſuch power being given by the ſtatute, and there being no power

Lawes on a former day moved, in arreſt of judgment, that no action lay by a common informer to recover penalties not exceeding 20*l.* under this ſtatute; for by *ſ.* 35. "It is enacted that any pecuniary penalty impoſed "by this act exceeding the ſum of 20*l.* may be ſued for "and recovered by any perſon who will ſue for the ſame "in any court of record at *Weſtminſter*, &c. and any "pecuniary penalty impoſed by this act and not exceed-"ing the ſum of 20*l.*, and for the recovery whereof no "proviſion is herein before contained, *ſhall and may* be "recovered before any juſtice of peace," &c.

at common law for a common informer to ſue for any penalty; and that the form of the declaration muſt be read *in blank* as to the ſum, ſuch form being otherwiſe inapplicable to a larger penalty before given, and that no ſuch action lay to recover two or more penalties of 20*l.* each.

Birch,

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Birch ſhewed cauſe againſt the rule, and relied on the whole of the 35th clauſe taken together, as ſhewing that the intention of the Legiſlature was that penalties of 20*l.* might be recovered in the ſuperior courts; for though it firſt of all ſays that any penalty *exceeding* 20*l.* may be ſo recovered, yet it goes on to ſay, "in *which* action it *ſhall* "be *ſufficient* to declare or allege that the defendant is "indebted to the plaintiff *in the ſum of* 20*l.* *(being the* "*ſum demanded by ſuch* action,)" &c. That ſhewed that the word *exceeding* had crept into the act by miſtake. But giving it its full effect, at leaſt it would not apply to caſes where, as here, the plaintiff went for more than one penalty of 20*l.* [But *the Court* expreſſing a decided opinion againſt ſuch a conſtruction of the act,] he contended that the juriſdiction of the ſuperior courts could not be ouſted without expreſs words, or by neceſſary implication; and here no ſuch words or neceſſity exiſted. For the 35th ſection ſaying, that any penalty *not exceeding* the ſum of 20*l.* *ſhall and may* be recovered before any juſtice of peace, &c. are not words of excluſion of any other juriſdiction, but only give an option to the informer, eſpecially as they are explained by the reſt of the clauſe. And he referred to *Hill* v. *Dechair* (*a*), *Shipman* v. *Henbeſt* (*b*), and *Rex* v. *Moreley* (*c*); in which latter, though the 6th ſect. of the Conventicle Act, 22 *Car.* 2. *c.* 1. ſays, "that *no other court whatſoever* ſhall meddle with any cauſes of appeal upon this act, but they ſhall be *finally* determined in the quarter ſeſſions *only*;" yet the Court held that the certiorari was not taken away, there being no *negative* words to ouſt the juriſdiction of this court. The caſe of

(*a*) Sty. 381. (*b*) 4 *Term Rep.* 109. (*c*) 2 *Burr.* 1040.

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Cates q. t. v. *Knight* (*a*), which went further than any other to ouſt this court of juriſdiction by implication only, proceeded on the ground that there was a clauſe giving the juſtices of peace a power to mitigate penalties of the amount there ſued for, over which they had before had expreſs juriſdiction given to them; and that ſuch clauſe would be rendered nugatory if thoſe penalties could be ſued for in the ſuperior courts: but here there is no ſuch clauſe; and no other neceſſity for controlling the general rule. The ſtat. 33 *H.* 8. *c.* 12. *ſ.* 1. ſays, that all murders within the King's palaces *ſhall be* inquired of within the ſame before the Lord Steward, &c. And the ſtat. 31 *Eliz. c.* 5. *ſ.* 7. ſays, that all ſuits upon any ſtatute for uſing any unlawful game, &c. *ſhall be* ſued out at the quarter ſeſſions or aſſizes, &c.: yet the juriſdiction of this court is holden not to be excluded by thoſe words. 2 *Hawk. c.* 26. *ſ.* 26—30. [*Lawrence* J. A common informer cannot ſue *at common law*; therefore you muſt ſhew ſome clauſe in the act giving him a power to ſue in this particular caſe.] Sect. 36. enacts, "that *all* pecu-"niary penalties impoſed by this act ſhall, when recovered "*either by action in any court*, or in a ſummary way before "any juſtices, be applied, *one moiety to the plaintiff in any* "*ſuch action*, or the informer before any juſtice, the other "moiety to the King." [*Lawrence* J. That only applies to the penalty *when recovered*, but does not give the informer the original power to ſue for it.]

Lord ELLENBOROUGH C. J. A common informer can have no right to ſue for any penalty, but where power is given to him for that purpoſe by the ſtatute. Now the ſtatute in queſtion only ſays, that a common informer may

(*a*) 3 *Term Rep.* 442.

ſue

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ſue in any court of record for any pecuniary penalty impoſed by the act *exceeding* 20*l.* The penalty given for this offence, each of which muſt be taken by itſelf, and cannot be reckoned accumulatively, does not exceed 20*l.*; and therefore it is not within the proviſions of the 35th clauſe, which give an action. And the ſenſe of that clauſe requires that the form of the declaration there afterwards given ſhould be read the ſame as if the ſum to be recovered were left in blank; for how otherwiſe can the penalty of 100*l.* given by the 15th ſection be recovered.

Per Curiam, Judgment arreſted.

Tueſday, June 12th.

MULLOY *againſt* BACKER.

The plaintiff contracted to carry the defendant, his family, and luggage, from *Demerary* to *Fluſhing*, and in the courſe of the voyage, within 4 days' ſail of *Fluſhing*, the ſhip was captured by an *Engliſh* ſhip of war, and brought into *England*, and the ſhip and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings ſtill pending againſt the ſhip, but the defendant and his family were liberated, and their luggage in fact reſtored to their poſſeſſion. Held that, however the queſtion might be as to the plaintiff's right to recover paſſage-money upon an implied aſſumpſit pro ratâ itineris if the ſhip were reſtored, yet pending the proceedings againſt the ſhip as prize in the Admiralty Court, no ſuch action could be maintained; for non conſtat but that the ſhip might be condemned and the freight decreed to the captors.

IN aſſumpſit, tried before Lord *Ellenborough* C. J. at the ſittings after laſt *Hilary* term at *Guildhall*, a verdict was found for the plaintiff for 250*l.*, ſubject to the opinion of this Court on the following caſe. In *February* 1803, and before the commencement of the preſent war with *Holland*, the plaintiff who was the maſter of a merchant ſhip called the *Doonhaag*, then lying at the *Dutch* ſettlement of *Demarara*, agreed with the defendant there to convey him, his family, ſervants, and luggage, permitting him to have the excluſive uſe of the cabin, from thence to *Fluſhing*, for the ſum of 2400 guilders, which are equal to *l.* , ſterling. In the month of *April* following the ſhip under the command of the plaintiff, with the defendant,

his

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his family, ſervants and luggage on board, ſailed from *Demarara* deſtined for *Fluſhing*, and on her arrival at the entrance of the *Britiſh* Channel on the 4th of *July* was captured by his Majeſty's armed brig the *Rambler*, and carried into *Plymouth* as a *Dutch* ſhip, war having been previouſly declared by his Majeſty againſt the *Batavian* republic. The defendant, his family and ſervants were ſet at liberty at *Plymouth*, and their luggage reſtored to them; but ſeveral pipes of wine which the defendant had on board were and ſtill are detained by the captors. The veſſel and her cargo have been libelled in the court of Admiralty for condemnation, but no deciſion as to the veſſel (*a*) which has been claimed in that court by a *Britiſh* ſubject as his property hath yet taken place: ſo much however of the cargo as was the property of *Britiſh* ſubjects has been reſtored, and the remainder of the cargo has been condemned as lawful prize. The veſſel, at the time when ſhe was ſo captured, had been 65 days on her voyage from *Demarara* towards *Fluſhing*; and by the uſual courſe of navigation ſhe would have completed her voyage to *Fluſhing* in four days more. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover any and what ſum? If the Court ſhould be of opinion that he was ſo entitled, the verdict for the plaintiff was to ſtand, or to be altered to ſuch ſum as the Court ſhould think fit. If the Court ſhould think that the plaintiff was not entitled to recover any thing, the verdict was to be entered for the defendant.

Richardſon, for the plaintiff, contended that he was entitled to recover pro ratâ itineris, according to the princi-

(*a*) It was admitted that ſince the recovery in this action the veſſel had been reſtored to a *Britiſh* claimant.

ples

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MUIR ex dem. *Watt* against BAKER.

ples eſtabliſhed in *Luke* v. *Lyde* (*a*); for here the defendant accepted his own liberation and his luggage at *Plymouth*, and did not require the plaintiff to carry him on to the end of his voyage. This was equivalent to the receipt of the goods by the freighter at *Bideford* in that caſe. "If," ſays Lord *Mansfield* in that caſe, "the maſter has his election to provide another ſhip to carry the goods to the port of delivery, and the merchant does not even deſire him to do ſo, the maſter is ſtill entitled to a proportion *pro ratâ* of the former part of the voyage." This caſe is indeed ſtronger than that, for there there was no real benefit rendered to the defendant by the partial performance of the contract; but on the contrary he was prejudiced by it; for the freight from *Bideford*, where the goods were accepted, to *Liſbon*, to which they were deſtined, was greater than from *Newfoundland*, from whence they were originally ſhipped. Whereas here the defendant has been actually benefited by the partial performance of ſo much of the voyage, having been conveyed 65 days forward to the place of his deſtination, and within a very few days fail of it: and the completion of the voyage was prevented by the capture without any default of the maſter. If it be ſaid that the paſſengers could not do otherwiſe than accept their liberty, and that this diſtinguiſhes the caſe from *Luke* v. *Lyde*, where the freighter had an option to accept his goods or not at *Bideford*, ſtill it may be anſwered that the defendant might have ſignified his diſagreement to accept a partial performance of the contract, by requiring the plaintiff to carry him on to *Fluſhing* in another ſhip. In that caſe the plaintiff had abandoned the ſhip to the underwriters, and had thereby

(*a*) 2 *Burr.* 882.

prevented

prevented himſelf from carrying the goods in the ſame ſhip; but he was holden to have the option of carrying them on in another veſſel, and thereby earning the whole freight, if the defendant had not agreed to accept them at *Bideford*, and pay only pro ratâ. At any rate the acceptance of the luggage would be evidence of the defendant's aſſent to pay a quantum meruit pro ratâ, taking that to be the only evidence of aſſent which the circumſtances of the caſe give riſe to. The caſe of *Luke* v. *Lyde* came on upon an implied aſſumpſit, and is not contradicted by *Cook* v. *Jennings* (*a*), where the plaintiff declared on the charterparty, and was holden to be precluded by his preciſe agreement from recovering as for a partial performance, though accepted by the defendant.

Giles, contrà, contended, 1ſt, that the defendant was not liable to pay the ſum demanded; 2dly, that the plaintiff had not any title to demand it. 1. The contract was entire to convey the defendant from *Demarara* to *Fluſhing* for a certain ſum, and it cannot be ſevered, according to *Cook* v. *Jennings*. [*Lawrence* J. That may depend upon the law of *Holland*; for it was a contract made in a *Dutch* colony, and to be perfected in *Holland*; and therefore whether the plaintiff can recover pro ratâ as for a partial performance of it, muſt depend upon the law of *Holland* in that reſpect.] It does not appear what the law of *Holland* is in this reſpect; and therefore it is ſufficient to ſhew that by the law of this country, by which the plaintiff ſeeks to recover, he is not entitled upon the facts ſtated. *Bright* v. *Cowper* (*b*) agrees with *Cook* v. *Jennings*, that he cannot recover on the contract itſelf for a partial performance; and *Cutter* v. *Powell* (*c*) ſhews that he can neither recover on

(*a*) 7 *Term Rep.* 384. (*b*) 1 *Brownl.* 21. (*c*) 6 *Term Rep.* 320.

the

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the contract, nor on a quantum meruit. The queſtion then is, whether this caſe comes within the exception of freight, which may be recovered on an implied aſſumpſit pro ratâ, if the goods be accepted before they arrive at their deſtined place? The only principle on which the caſe of *Luke* v. *Lyde* (*a*) can be maintained, is that of an implied contract ariſing out of a benefit conferred by one party and received by the other: though it is difficult to reconcile the deciſion in that caſe with that principle; for there the defendant received no benefit but a detriment from having his goods carried to *Bideford*. [Lord *Ellenborough* C. J. The caſe of *Luke* v. *Lyde* ſeems to have proceeded upon an implied contract ariſing *out of the marine law*.] There was however a conſideration in that caſe; for the maſter might have refuſed to deliver the goods at *Bideford*, and might have inſiſted on performing his contract and earning his whole freight by forwarding the goods to *Liſbon*; and his waving that right, and giving them up to the owner, who choſe to have them at *Bideford*, and taking only freight pro ratâ, was a conſideration for the promiſe. [Lord *Ellenborough* C. J. *Lyde* in that caſe accepted the goods from the *recaptors*, and not from the maſter; ſo that the maſter had no lien on the goods at the time.] If the goods were not conſidered as given up by the maſter in that caſe, there could be no conſideration at all for the implied aſſumpſit: but the caſe turned on the aſſumption of the maſter's right and power to have carried them on to the port of delivery. And that conſideration furniſhes on the ſecond ground of objection a material diſtinction between that caſe and this. For here the plaintiff's *ſhip* was brought into *Plymouth* as a *prize*, and he himſelf as a *priſoner of war*. The defendant was not libe-

(*a*) 2 *Burr.* 882.

rated,

rated, nor his luggage reſtored to him by the plaintiff, but by the captors. There was therefore no conſideration moving from the plaintiff which could be the foundation of an implied aſſumpſit. The cargo has been actually condemned, and at the time when this action was tried proceedings were pending in the Admiralty court for the condemnation of the ſhip, in which event the freight would be due, if at all, to the *captors*; though in theſe caſes it has been moſt uſual to decree the reſtoration of the luggage of paſſengers to them without freight. But in ſtrictneſs the luggage is as much prize as the bulk of the cargo. And at any rate there can be no lien on the *perſon* for the paſſage money, but only on the *luggage*. All the benefit the defendant has received, which is his own and family's liberation and their luggage, was after they were brought into this country as *priſoners*, and from other hands than the plaintiff's. *Paſſage money* as well as *freight* muſt follow the title to the ſhip. [*Lawrence* J. Foreign writers conſider paſſage money the ſame as freight. Lord *Ellenborough* C.J. Except for the purpoſe of *lien* it ſeems the ſame thing.]

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Richardſon began to reply upon the firſt point of the argument: but *The Court* ſuggeſted that the difficulty which preſſed moſt on the plaintiff was that he was at any rate premature in commencing this action, *pending* the proceedings in the Admiralty Court to condemn the ſhip as prize, when non conſtat at the time that the ſhip would be reſtored, or that the freight might not be decreed to the captors. To this he anſwered, that the pendency of the ſuit there, which might involve the ſame queſtion, was only matter pleadable in abatement. That by the liberation in fact of the paſſengers and their lug-

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gage all right of the captors was waved, and the parties were reſtored to their original relative ſituation, from whence it appeared that the defendant had in fact received a certain partial benefit from the plaintiff, for which the law would raiſe an implied aſſumpſit on a quantum meruit. That it did not even appear that the defendant was an enemy or amenable to the law of prize.

Lord ELLENBOROUGH, C. J. If this were the caſe of a contract to be decided only according to the law of *England*, without adverting to any rule drawn from the marine law, it would be the caſe of a contract undertaken but not performed, and conſequently the plaintiff could not be entitled to recover his wages or hire as for a partial performance of it pro ratâ. But according to the caſe of *Luke* v. *Lyde* the marine law has been imported as it were into this ſpecies of contract, and a right to recover wages or freight pro ratâ has been introduced. There it ſeems an implied contract was raiſed, if not on the ground of *beneficial* ſervice performed for the defendant, at leaſt on the ground of *labour* performed in his ſervice by the plaintiff, for which none other but he was entitled to recover. But this is a very different caſe; for here by the capture other rights have intervened and interfere with thoſe of the maſter; and pending the diſcuſſion of thoſe rights in a court, which has not only competent but excluſive juriſdiction over the queſtion of prize, and which has power to deal with the freight as it thinks proper, this action was brought, which aſſumes the right to the freight to be in the plaintiff. It is enough therefore to ſay that the action is at leaſt premature. Pending the ſuit in the Admiralty no perſon

perſon had a right to reſtore the paſſenger's luggage, which in ſtrictneſs is as much ſubject to the queſtion of prize as the ſhip and cargo: and the mere reſtoration of it de facto by an unauthorized hand cannot affect the right of the captors pending the ſuit. This diſtinguiſhes the caſe materially from that of *Luke* v. *Lyde*: But when a caſe like that ſhall occur, in deference to the authority of thoſe who decided it we ſhould moſt likely adopt the ſame rule.

GROSE J. It is clear there can be no recovery on any expreſs contract ſtated; for there has been no performance of it. Then can we imply a contract to pay the money from any thing which is ſtated? Now conſidering the caſe in the light to which our attention has for ſome time been confined, it is impoſſible to ſtate a ground for the plaintiff's recovery. For by the facts ſtated it appears that the ſhip is now libelled as prize in the Court of Admiralty, and for aught appears is in a courſe of condemnation: and if that Court decreed that the earnings of the ſhip belonged to another, how could this plaintiff be entitled to recover them. The action therefore was prematurely brought.

LAWRENCE J. This action was at any rate brought too ſoon pending the proceedings in the Admiralty Court, where it is admitted that freight may be directed to be paid to the captors when goods are reſtored to the claimants: and if paſſage money ſtand on the ſame footing, the plaintiff, whoſe ſhip has been taken as prize, and who in caſe of condemnation may loſe all claim to freight for goods, cannot now claim a compenſation for the defendant's paſſage.

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LE BLANC J. It is not neceſſary to give any opinion upon the caſe of *Luke* v. *Lyde*; for as this caſe now ſtands the plaintiff cannot at any rate recover in this action. Suppoſing this were a caſe for the freight of goods only, which have been ſtopped in the courſe of their voyage and carried to another place, then by aſſimilating it to the caſe of *Luke* v. *Lyde* the plaintiff contends that he is entitled to recover pro ratâ for the freight, not on the ground of the original contract, but by reference to the marine law, on which the Courts have ſhaped a courſe to recover for a benefit to the defendant which made part of the original contract. That was the footing on which the caſe of *Luke* v. *Lyde* was put; that though the maſter could not recover on the original contract which was not performed; yet that he might recover upon an implied aſſumpſit for a benefit already conferred on the defendant; which in that caſe was implied from the acceptance of the goods by the defendant at the port into which they were carried. But here no benefit can be implied to the defendant from the plaintiff. For the plaintiff is a priſoner of war, and incapable of performing his contract; and every thing connected with his ſhip and the benefit to be derived from it is transferred to another by the capture, or at leaſt it may be ſo, which cannot be known pending the ſuit in the Court of Admiralty. Therefore till reſtitution be awarded I cannot conceive how any cauſe of action can ariſe to the plaintiff. If the ſhip had been condemned there it is clear that the plaintiff could not have recovered.

It was thereupon agreed that a

Nonſuit ſhould be entered.

The KING *againſt* The LEEDS and LIVERPOOL Canal Company.

Wedneſday, June 13th.

THE defendants appealed to the quarter ſeſſions at *Preſton* in *Lancaſhire* againſt a rate made in *December* laſt for the relief of the poor of the townſhip of *Habergham Eaves* in that county, whereby they were rated for a warehouſe and land occupied with it *9s. 6d.* and for the *rates, tolls, and duties* ariſing from the navigation to the ſaid Company within the ſaid townſhip of *Habergham Eaves*, 40*l.*, being a rate made upon the ſum of 1352*l.* 12*s.* 4*d.* On hearing the appeal the Seſſions confirmed the rate, ſubject to the opinion of this Court as to the laſt charge, to which the appellants confined their objections, on a caſe ſtating in ſubſtance,

That the rate was duly allowed and publiſhed. That by ſtat. 10 *Geo.* 3. the incorporated company of proprietors of the canal navigation from *Leeds* to *Liverpool* were enabled to make a navigable canal from *Leeds* to *Liverpool*, and to take *a certain ſum per mile* for the tonnage and wharfage of goods navigated thereon, and ſo in proportion for any greater or leſs quantity than a ton; which rates were to be paid to ſuch perſons at ſuch places near the canal, in ſuch manner, and under ſuch regulations, as the Company ſhould appoint. It was alſo enacted "that the ſaid *tolls, rates and duties* ſhould at all times "thereafter *be exempt from the payment of any taxes, rates,* "*aſſeſſments, or impoſitions whatſoever*, any law or ſtatute

Where goods are carried along two different lines of canal, one of which is by ſtatute exempted from being rated in reſpect of the *tolls*, and the other not; tho' the voyage happen to finiſh on the unexempted line where the tolls become due and are received, yet the Canal Company ſhall not be rated for more than ſuch proportion of the tolls as accrued in reſpect of the carriage along the unexempted line. And the toll ariſing in reſpect of ſo much per ton per mile is to be rated only for ſo many miles as the goods were carried along the unexempted line. And where the act directs that the *tolls* ſhould be exempt from any taxes, rates, &c. other than ſuch as the *land* which ſhould be uſed for the purpoſe of the navigation would have been ſubject to if the act had not been made; that goes to exempt the *tolls* quà *tolls* altogether from being rated in reſpect of the line ſo exempted, leaving the *land* rateable as before.

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"to the contrary notwithſtanding, *other than ſuch taxes,* "*rates, and aſſeſſments as the land which ſhould be uſed for* "*the purpoſe of the ſaid navigation would have been ſubject* "*to if this act had not been made.*"

By another act of the 23 *Geo.* 3. incorporating the ſaid canal navigation with the river *Douglas* navigation, which had been made navigable under the authority of an act paſſed in the 6 *Geo.* 1., and then purchaſed of the proprietors of the ſaid river navigation by the *Leeds* and *Liverpool* Canal Company, it is enacted, "that the ſeveral "navigations, cuts, or canals, and every part thereof, and "the ſaid tolls, rates, and duties to be taken upon the "ſame, or any part thereof, under the authority of this "or either of the aforeſaid acts ſhould at all times be "*exempt from the payment of any taxes, rates, aſſeſſments, or* "*impoſitions whatſoever, other than and except ſuch taxes,* "*rates, and aſſeſſments as the land which had been or ſhould* "*be uſed for the purpoſes of ſuch navigations, cuts, or canals* "*were or would have been ſubject to if this act had not been* "*made:* and that ſuch navigations, cuts, or canals, ſhould "not be ſubject or liable to the payment of any taxes, "rates, or aſſeſſments, ſave and except ſuch taxes, rates, "and aſſeſſments as had been and then were uſually "charged and aſſeſſed thereon, any law or ſtatute to the "contrary notwithſtanding. But nothing in this clauſe "to exempt any quay, wharf, warehouſe, or other houſe, "from the payment of any taxes, rates, or aſſeſſments. "And it is enacted, that the clauſe in the ſaid act "10 *Geo.* 3. exempting the tolls, rates, and duties ariſing "from the ſaid canal from aſſeſſments ſhould be repealed." The ſaid canal navigation was completed under theſe acts and another act of the 30 *Geo.* 3. from *Leeds* to *Wanleſs Banks*, a diſtance of 47 miles 6 furlongs: when it being

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found deſirable to make a deviation in the then parliamentary line, by another act of the 34 *Geo.* 3. the Company were empowered to make a deviation and cut from the former line from *Wanleſs Banks* through ſeveral townſhips therein mentioned, and amongſt others *Habergham Eaves*, to communicate with the *Douglas* navigation at *Wigan*, and the Company were authorized to take for tonnage and wharfage of goods, &c. navigated thereon, a *certain ſum per mile*, and ſo in proportion for a greater or leſs quantity than a ton; to be paid to ſuch perſons, at ſuch places, &c. (as before) as the Company ſhould direct. And that every fraction of a mile ſhould, in aſcertaining the rates, be deemed a whole mile. And it incorporates all clauſes, powers, authorities, proviſoes, and exemptions, &c. contained in the acts of the 10th *Geo.* 3., not repealed by the acts of the 23d and 30th *G.* 3. or by this act; and alſo incorporates all clauſes, &c. in the act of the 23d *Geo.* 3. relating to the *Leeds* and *Liverpool* canal not repealed by the act of the 30th *Geo.* 3. or by this act; and alſo all clauſes, exemptions, &c. in the act of the 30th *Geo.* 3. relating to the *Leeds* and *Liverpool* Canal, not repealed by this act, *except* ſo much of the ſaid acts as enables the ſaid Company to deviate the line of the ſaid canal from *Leeds* to *Liverpool*, *and to exempt the tolls, rates, and duties therefrom ariſing from the payment of a·y taxes, rates, aſſeſſments, or impoſitions whatſoever*, &c. Under the powers of the ſtat. 34 *Geo.* 3. ſo much of the ſaid canal navigation has been completed in the varied line of deviation as extends from *Wanleſs Banks* aforeſaid through a number of townſhips (and amongſt others *Habergham Eaves*) to a place called *Henfield Common*, in the townſhip of *Clayton le Moors*, being a diſtance of 14 miles and 7 furlongs. In the townſhip of *Habergham Eaves*

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the Company have erected a warehouſe, where goods from all parts of the canal are landed, having paſſed as well upon the canal made under the authority of the acts of the 10th, the 23d, and 30th *Geo.* 3. as the deviation made under the authority of the ſtat. 34 *Geo.* 3.; and the tonnage of ſuch goods ſo landed there amounted, from the 1ſt of *January* to the 31ſt of *December* 1803, to 1352*l.* 12*s.* 4*d.*, of which 240*l.* 17*s.* 4*d.* is the proportion ariſing from the navigation of that part of the new line of canal made by virtue of the act of the 34th *Geo.* 3. That part of the canal which lies in *Habergham Eaves* has coſt in making and completing 46,548*l.* 19*s.* 0*d.*; and the average annual expenditure of the Company for repairs, damages, taxes, wages, and expences relating to that part of the canal made by virtue of the ſtat. 34 *Geo.* 3. and the part communicating therewith at *Wanlſs Banks*, made under the authority of the ſaid acts of the 10th, 23d, and 30th *Geo.* 3., and the proportion of the average annual expenditure of the Company for the committees and ſalaries and expences of the concern at large, belonging to the above-mentioned parts of the canal, amounting to 362*l.*: but no deduction was made in reſpect of ſuch laſt-mentioned ſum from the amount of the tolls, rates, and duties upon which the rate was made. Notes or bills of lading are delivered by the maſters, &c. at various places upon the line of the canal appointed by the Company, one of which is *Habergham Eaves*: and ſuch notes are tranſmitted by the warehouſe-keeper there to the chief office of the Company in *Bradford*, where a particular of each perſon's tonnage and rates is made out, and which is afterwards collected by the Company's agents from ſuch perſons, at their places of abode, wherever they may be, or is paid at the chief office of the Company at *Bradford*;

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ford; but no part of the canal paſſes through the township of *Bradford*. The Company are not carriers upon the canal, nor the owners of any veſſels employed thereon. The Seſſions being of opinion that the appellants were rateable for the relief of the poor of *Habergham Eaves* for all the tolls ariſing upon goods diſcharged within *Habergham Eaves*, although carried as well upon the canal made by virtue of the acts of the 10th, 23d, and 30th *Geo.* 3. in the original line, as upon the deviation made under the authority of the ſtat. 34 *Geo.* 3., and that, without making any deduction from the amount thereof in reſpect of the ſum of 360*l.* for repairs, wages, and other outgoings, confirmed the rate.

Scarlett and *Becket*, in ſupport of the order of Seſſions, contended, firſt, that the *tolls* were not exempted from being rated; but only the *quantum* of the rate was limited by the clauſe of exemption to what the *land* uſed for the navigation would otherwiſe have been ſubject to. And they referred to *Rex* v. *The Undertakers of the Aire and Calder Navigation* (*a*), to ſhew that a clauſe of exemption of this kind did not limit the quantum of the rate to what it was at the time of paſſing the act; but that the quantum would vary with the improvement of the land. [*Lawrence* J. The meaning of the clauſe of exemption clearly is that the *land*, quà *land*, ſhall not be exempted, but that the *tolls* ſhall be exempted.] Then, 2dly, The exemption does not apply to any part of the tolls which ariſe within the new and unexempted line of canal. It has been determined that tolls are only rateable where they become due, and they do not become due, nor have any exiſtence *as tolls* until the completion of the voyage for

(*a*) 2 *Term Rep.* 660—4.

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which the goods are contracted to be carried. Till then the ſubject-matter of the exemption cannot be ſaid to exiſt. Theſe tolls, therefore, not ariſing and becoming due till the goods arrived at a place beyond the line of exemption, the exemption does not attach upon them. And they cited *Rex* v. *Aire and Calder Navigation* (*a*), and *Rex* v. *Page* (*b*), and *Rex* v. *The Staffordſhire and Worceſterſhire Canal Navigation* (*c*), as in point; particularly the latter, where the Company were entitled to take ſo much per ton *per mile*, as in this caſe, and where they did *in fact* collect the tolls at intermediate pariſhes in the courſe of the voyage, and yet it was holden that the tolls were only rateable in the ſeveral pariſhes *where they became due*, which was *where the reſpective voyages finiſhed*.

Topping and *Wood* contrà were ſtopped by the Court.

Lord ELLENBOROUGH C. J. I agree with the principle of thoſe caſes, that the toll is only due and can only be taxable, if at all, at the place where the voyage ends for which the goods were contracted to be carried, and that it is not to be portioned out amongſt the ſeveral pariſhes through which the goods may intermediately paſs: but where the legiſlature have expreſsly exempted a particular line of navigation from being rateable in reſpect of the tolls, along which line the goods have been carried in reſpect of which in part the toll is calculated, there is nothing which ſhould prevent us from giving effect to this exemption by ſaying that where the toll is received, it may be taxed for that proportion of it accruing along the line which is taxable, but that it ſhall

(*a*) 2 *Term Rep.* 660—4. (*b*) 4 *Term Rep.* 543.
(*c*) 8 *Term Rep.* 340.

not

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not be taxed for that proportion which accrued along the line which is exempted. Now here a rate has been made taxing the tolls altogether, without diſtinguiſhing between the different parts which are exempted or not exempted: that cannot be ſupported. We cannot apportion it; thoſe who make the rate ſhould apportion it. The rate, as it is, cannot be ſupported. The word *exempt* may be taken to mean *precluded from being chargeable.* The meaning of the clauſe of exemption was, that the land or ſpace occupied by the canal ſhould be liable to be taxed as it was before, that is as *the land* was before: but the *tolls* were not rated before, for they had no exiſtence; and therefore are exempted.

GROSE J. In order to tell whether the tolls are rateable or not, it muſt be ſeen from whence they aroſe. One line of the navigation is exempted from being rated in reſpect of its tolls, and another not. Then ſuch proportion of the tolls as have accrued along the exempted line is not liable to be rated let it be due or received where it will; otherwiſe the exemption which the legiſlature have holden out to the company would be a mere trick and may become nugatory.

LAWRENCE J. As to the exemption itſelf, the object of the clauſe was to take care that when the company were engaging in a hazardous undertaking which was conſidered to be beneficial to the public, they ſhould not be liable to any other taxes than thoſe which the land they made uſe of in their undertaking was before liable to. Now the *land* was not before liable to be rated for *toll*; and therefore the proprietors ſhall not be liable now to a rate *on tolls* in reſpect of it when converted into a canal.

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canal. But this does not go to exempt the land from paying what it did before. Upon the other point I fully accede to what has been ſaid. The toll muſt be apportioned pro ratâ itineris for ſo much of it as accrued on the unexempted line, and that proportion only is liable to be rated where it becomes due.

Le Blanc J. I am of the ſame opinion. We cannot adopt any other conſtruction without totally defeating the object of the legiſlature in giving the exemption. And this may be done without difficulty. The land will be rated in the ſame manner as it was before the act. The tolls will be rated where they become due; but in calculating the quantum of toll which is the ſubject of the rate, allowance muſt be made for ſo much of the toll as accrued in reſpect of the line exempted. For inſtance, if two-thirds of the line are exempted, then tolls which have come along the whole line to *Habergham Eaves*, will only be liable to be rated in the proportion of one-third. So if the goods have been carried 15 miles, five miles of which are not exempt, they muſt be rated only for thoſe five miles; and ſo in proportion. It will be eaſy therefore in all caſes to calculate the proportion of tolls which are rateable, according to the number of miles which the goods have been carried along the exempted and unexempted lines of the canal.

Rate on the tolls quaſhed.

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Wednesday, June 13th.

The KING *againſt* The Inhabitants of DENBIGH.

TWO juſtices removed *Robert Hughes*, his wife, and children, by name, from the pariſh of *Denbigh* to the pariſh of *Heullan*. The Seſſions on appeal quaſhed the order, ſubject to the opinion of this Court on the following caſe.

One may gain a ſettlement by renting a tenement of above 10*l.* a-year in the pariſh where he *reſided*, tho' ſuch reſidence were *in a turnpike-houſe*, as ſervant to the collector for whom he received the tolls; for the general turnpike act 13 *Geo.* 3. *c.* 84. *ſ.* 56. only ſays that "no gate-keeper or perſon *renting the tolls and reſiding in the toll-houſe* ſhall *thereby* gain a ſettlement, *i. e.* by ſuch taking of the toll-houſe or renting the tolls.

The paupers being legally ſettled in *Denbigh*, on the 14th of *May* 1802 *Robert Hughes* agreed with the toll-taker in *Heullan* to go and receive the tolls in the turnpike houſe in *Heullan*, as the ſervant and for the uſe of the toll taker; for which he (the pauper) was to be paid 3*s.* 6*d.* per week. The pauper went there accordingly; and in about a fortnight afterwards, while he was at the turnpike gate houſe, took from one *Evans* a field in *Heullan* at the rent of 12*l.* a-year, and gave him 6*d.* earneſt. The pauper continued in poſſeſſion of that field for two or three months, and reſided day and night during that time with one of his children at the turnpike gate houſe. In the courſe of two or three months after the pauper had taken the ſaid field, *Evans* coming by the turnpike gate told the pauper that he was uneaſy on account of the rent, and aſked the pauper to give him ſome ſecurity, to which the pauper anſwered that he could not give him any ſecurity, but had no objection to give up the field, and he did then give it up accordingly. The pauper took the field for the purpoſe of getting hay and graſs to keep his mare, but he never reaped any benefit from the field, nor did he turn his mare into it, becauſe the hay was growing. The pauper continued at the turnpike gate houſe for 12 months after he had given up the field, receiving for part of that time 4*s.* 6*d.* and latterly 5*s.* per week from the taker of the turnpike gate as aforeſaid. The

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pauper's wife and three of his children lived during that time in a houſe in *Denbigh*, for which the pauper paid 3*l.* 3*s.* per annum; but they ſometimes ſlept with him at the turnpike. The turnpike gate houſe is the property of the commiſſioners of the turnpike road, but is always ſet with the tolls to the toll taker, and was ſo ſet while the pauper lived there and received the tolls there for ſuch toll taker as aforeſaid.

The Seſſions was of opinion that the pauper had bonâ fide holden lands to the value of 10*l.* a-year in the pariſh of *Heullan* for above 40 days, and lived during ſuch holding at the ſaid turnpike gate houſe, as before ſtated; but reverſed the order of removal in this caſe on the ground of the act of 13 *Geo.* 3. *c.* 84. *ſ.* 56. which enacts, "That no gate-keeper of any turnpike-road, or perſon "renting the tolls thereof, and reſiding in any toll-houſe "belonging to the ſaid truſt, ſhall be removeable from ſuch "toll-houſe, &c. unleſs he ſhall become actually charge-"able to the pariſh, &c. in which ſuch toll-houſe is "ſituate. And that no ſuch gate-keeper, or perſon "renting ſuch tolls, and reſiding in ſuch toll-houſe as "aforeſaid, ſhall *thereby* gain a ſettlement in any pariſh "or place whatſoever; and that no tolls to be taken at "any gate erected or to be erected by the truſtees of "any turnpike road, nor any toll-houſe erected or to be "erected for the purpoſe of collecting the ſame, nor any "perſon in reſpect of ſuch tolls or toll-houſe, ſhall be "rated or aſſeſſed towards the payment of any poor's "rate or any other public or parochial levy what-"ſoever."

Conſt and *Scarlett*, in ſupport of the order of ſeſſions, obſerved that the legiſlature, by providing that no *gate-keeper*

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keeper or renter of tolls *reſiding in any toll-houſe* ſhould *thereby* gain a ſettlement, meant not only that the *renting of the tolls* ſhould not gain him a ſettlement, but that the *reſidence in the toll-houſe* ſhould not be contributable to a ſettlement: now here it would be contributable to a ſettlement by giving him a reſidence in the pariſh, if that would ſuffice.

The Court however thought the caſe too clear for further argument; and Lord *Ellenborough* C. J. ſaid, the act only ſays that a gate-keeper ſhall not *thereby* gain a ſettlement, that is, by keeping the gate or *renting the tolls* and reſiding in the toll-houſe. But that does not prevent him from gaining a ſettlement aliundè in the ſame pariſh where the gate-houſe is ſituated. This man did not gain a ſettlement by renting the tolls or by keeping the gate, but by renting a cloſe in the pariſh worth above 10*l.* a-year for more than 40 days, and reſiding in the ſame pariſh. He did not even rent the tolls: he was no more than a mere ſervant to collect the tolls for another.

Per Curiam, Order of Seſſions quaſhed.

Erſkine, *Topping*, and *Benyon* were to have argued againſt the order of Seſſions.

The KING *againſt* The Inhabitants of WAKEFIELD.

Wedneſday, June 13th.

The Seſſions having decided in favour of a ſettlement in *A.* by which the pauper's father was proved to have been *relieved while reſident in another pariſh* 40 years ago, and before the pauper's birth, and the only evidence to oppoſe this being that of the pauper's own *birth* in *B.*, this Court confirmed the order of Seſſions on a caſe reſerved.

TWO juſtices removed *Mary the wife of* George Fielding, *and her five children*, by name, from the townſhip of *Alverthorpe with Thornes* to the townſhip of

Wakefield,

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Wakefield, both townſhips being within the pariſh of *Wakefield* in the county of *York*, and maintaining their own poor ſeparately. On appeal the Seſſions confirmed the order of removal, ſubject to the opinion of this Court on the following caſe. The reſpondents, in ſupport of the order of removal, proved that the appellants had at various times during forty years paſt relieved *George Fielding*, the father of *George Fielding*, the huſband of the pauper *Mary*, and different members of his family, ſome by being taken into the appellant's workhouſe, and ſome in otherways during the time that they reſided in the townſhip of *Stanley*, and had provided coffins for and defrayed the expences of the funerals of ſome of the family. It was alſo proved that *George Fielding*, who is now 38 years old, the huſband of the pauper *Mary*, and father of the other paupers, was born and has always lived in the townſhip of *Alverthorpe with Thornes*. The above was the only evidence given in ſupport of or againſt the order of removal.

Gibbs and *Wood* in ſupport of the order of Seſſions. The giving relief to a pauper's family, while reſident *out of the townſhip* ſo relieving, is good evidence of a ſettlement there, eſpecially for ſo long a time as 40 years. This ſhews that the relief was not given to them as *caſual poor*; for that the paupers could only have been entitled to in the pariſh in which they lived at the time. Then admitting that the birth of *George Fielding*, the huſband of the pauper *Mary*, in *Alverthorpe* was, if it had ſtood alone, primâ facie evidence of a ſettlement there; yet it was the province of the Seſſions to decide upon the weight of evidence, and their concluſion muſt decide the ſettlement.

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Topping and *Lambe* contrà. The principal queſtion was as to the ſettlement of *George Fielding* the huſband of the pauper *Mary*, and the father of the other paupers. A derivative ſettlement is only to be reſorted to upon failure of any evidence of the party's own ſettlement. Here the place of birth was primâ facie evidence of the huſband's ſettlement, and could not be gotten rid of by mere preſumptive evidence of his father's ſettlement at an antecedent time. If indeed the huſband himſelf had been proved to have received relief while reſiding out of his townſhip, it would have rebutted the preſumption of ſettlement from the place of his birth; though the fact of receiving relief from the pariſh where a party reſides is not even primâ facie evidence of ſettlement according to *R.* v. *Chadderton* (*a*). It is not ſtated here when the relief was given to the father's family; it ſhould have appeared at leaſt that it was given before the pauper's huſband was an adult, and was emancipated from his father's family.

Lord ELLENBOROUGH, C. J. The relief was given by the townſhip of *Wakefield* to the *father* of the pauper's huſband and to different members of *his* family, which muſt mean the family of the pauper's huſband's father: and this while they were reſiding in another townſhip. This was *evidence* of the father of the pauper's huſband's ſettlement in *Wakefield* at that time: and this is ſtated to have been done at different times during the laſt 40 years; the particular periods are not material; for no other ſettlement has been eſtabliſhed ſince: and all things are preſumed to continue in the ſame ſtate unleſs ſome-

(*a*) 2 *Eaſt*, 27.

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thing be ſhewn to the contrary. Then the only evidence ſet up againſt this is that of the birth of the pauper's huſband in *Alverthorpe*, which is no more than primâ facie evidence of a ſettlement there. Then if there were evidence on both ſides the Seſſions were to decide on it.

GROSE J. There was primâ facie evidence on both ſides, on the weight of which the Seſſions were to determine.

LAWRENCE J. I am of the ſame opinion. The father was relieved 40 years ago by the townſhip of *Wakefield*, which muſt have been before the birth of the pauper's huſband who is now only 38 years old.

LE BLANC J. The leaſt that can be ſaid is that there was evidence on both ſides; but the place of birth is the weakeſt evidence of ſettlement.

Orders confirmed.

Friday, June 15th.

WALTERS *againſt* FRYTHALL.

An application to make the plaintiff, who reſided abroad, give ſecurity for the coſts, refuſed after notice of trial given, as the defendant might have applied earlier after knowledge of the fact of the plaintiff's reſidence, and before ſo much of the coſts incurred.

A. MOORE moved again for a rule (which had been mentioned the day before) calling on the plaintiff to ſhew cauſe why he ſhould not give ſecurity for the coſts in caſe he was nonſuited or the defendant obtained a verdict; on the ground that the plaintiff was living in *Jerſey*, and that the action was brought at the inſtigation of his wife's friends, (ſhe living apart from her huſband,) without his knowledge or conſent. In this caſe iſſue was joined and notice of trial given. And he referred to

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Barker v. *Hargreaves* (*a*), where a ſimilar rule was granted after notice of trial given, though objection was taken that the application ſhould have been made ſooner.

The Court however ſaid that the better rule, and ſuch as was moſt conſonant to the practice, was that the application ſhould be made as ſoon as the defendant reaſonably could do it after knowledge of the fact of the plaintiff's reſidence abroad; that otherwiſe if he waited ſo long till after notice of trial given and coſts incurred, the granting of ſuch a rule would be in effect to compel the plaintiff's attorney to give the ſecurity required. Therefore, becauſe the defendant might have come earlier,

Rule refuſed.

(*a*) 6 *Term Rep.* 597.

The KING *againſt* PATCHETT.

Saturday, June 16th.

A CONVICTION of the defendant under the act of the 39 & 40 *Geo.* 3. *c.* 50. for extending the proviſions of the vagrant act 17 *Geo.* 2. *c.* 5. being returned by certiorari into this Court; the information ſtated that one *J. G.* informed *P. S.* clerk, one of the juſtices of the peace for the county of *Leiceſter*, that the defendant and another perſon were found in a plantation in the lordſhip of *Preſtwould* in the ſaid county in the night, &c. having nets, engines, and other inſtruments for the purpoſe and with intent to deſtroy game, &c. contrary to the form of the ſtatute. Then after ſtating the ſummons of the defendant,

By the vagrant act 17 *Geo.* 2. *c.* 5. after a rogue and vagabond has been committed to the Seſſions, and they, adjudging him to be *a rogue and vagabond*, order him to be further impriſoned and kept to hard labour for ſix months, and to be publicly *whipped* during that time, and that after the expiration of his impriſonment he ſhould be *ſent and employed in his Majeſty's ſervice purſuant to the ſtatutes*, &c. held that the whole forms one ſentence, and ſuch order being defective in the latter part for want of adjudicating whether the party were to ſerve his Majeſty *by ſea* or *land* as diſcriminated in the ſtatute, the conviction ſhall be quaſhed; though the former part of the ſentence, adjudging the *rogue and vagabond* to be *whipped*, be valid.

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fendant, his appearance and pleading not guilty, and the proof of the offence by one witneſs, the record proceeded, "and thereupon the defendant on, &c. before the juſtice, "&c. on oath, &c. is *convicted, and he is hereby deemed to* "*be a rogue and vagabond* within the meaning of the "ſtatute 39 & 40 *Geo.* 3. In witneſs &c." There was alſo returned an order of the Quarter Seſſions of the ſame county, holden the 10th of *January*, 44 *Geo.* 3. ſtating that the defendant was brought before that Court in the cuſtody of the keeper of the Houſe of Correction, when it appeared to the Court that the defendant was charged, &c. (as before mentioned). And ſtating further that it appeared to the ſaid Court by the warrant of commitment under the hand and ſeal of the ſaid *P. S.* clerk, ſo being ſuch juſtice as aforeſaid, dated 1ſt *November* 1803, that the defendant was by the ſaid juſtice committed as a rogue and vagabond to the keeper of the ſaid houſe of correction, &c. there to remain until the next Seſſions, &c. or until he ſhould be diſcharged by due courſe of law: whereupon the defendant being under ſuch commitment before this Court, being the next, &c. the ſaid Court doth proceed to examine the circumſtances of the caſe. (Then after ſtating the examination of the witneſs proving the offence, and that the defendant when called on made no defence.) The Court therefore conſidered and adjudged that the defendant was and is *a rogue and vagabond*, and that he ſhould be detained and kept in the houſe of correction, &c. to hard labour for ſix months, and that during ſuch impriſonment he ſhould be once publicly whipped, &c. and at the expiration of ſuch impriſonment the defendant, being above the age of 12 years, was further ordered to be ſent and employed

employed *in his Majeſty's ſervice purſuant to* the ſtatutes in ſuch caſe made.

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Balguy objected to the conviction; 1ſt, *the Seſſions* have adjudged the defendant to be *a rogue and vagabond*, and yet in addition to the impriſonment have ordered him to be *whipped*; whereas by the vagrant act 17 *Geo.* 2. *c.* 5. *the Seſſions* have only authority to order one whom they adjudge to be *an incorrigible rogue* to be *whipped*. That act deſcribes three claſſes of offenders; 1. Idle and diſorderly perſons; 2. Rogues and vagabonds; 3. Incorrigible rogues. Over the two firſt claſſes a ſingle magiſtrate has juriſdiction to act, and may puniſh them; but cognizance of the latter is referred to the Seſſions. In regard to *rogues and vagabonds*, a ſingle magiſtrate may by *ſ.* 7. either order them to be publicly whipped and paſſed to their pariſh, or to be ſent to the houſe of correction until the next ſeſſions, or for any leſs time. If committed to the ſeſſions, and that Court "ſhall, on "examination of the circumſtances of the caſe, adjudge "ſuch perſon a *rogue and vagabond*, or *an incorrigible rogue*; they may, if they think convenient, order *ſuch* "*rogue or vagabond* to be kept in the houſe of correction "to hard labour for any further time not exceeding ſix "months." (Here ends the further puniſhment of *a rogue and vagabond.*) "And *ſuch incorrigible rogue* for any "further time not exceeding two years nor leſs than ſix "months from the time of making ſuch order of ſeſſions; "and during the time of *ſuch perſon's confinement*" (this muſt relate to the laſt antecedent, viz. ſuch *incorrigible rogue's* confinement) "to be corrected *by whipping* in "ſuch manner, time, and place, &c. as they ſhall think "fit. And *ſuch perſon* may afterwards be ſent away by

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"such pafs, mutatis mutandis, as aforefaid. And if *fuch* "*perfon* being a male is above the age of 12 years the "Seffions may at any time before he is difcharged from "the houfe of correction fend him to be employed in "his Majefty's fervice, either *by fea or land* if they fhall "fee proper."

The Court fuggefted a difficulty in adopting this conftruction; for if the words "*fuch perfon*" which occur in the latter part of the claufe are to be referred to an *incorrigible rogue* only, there will be no provifion made for the paffing of a *rogue and vagabond* by the Seffions after his imprifonment, which the evident intention and policy of the act requires, in order to prevent vagrancy. Upon this ground the Court inclined to think that *fuch perfon* referred as well to a *rogue and vagabond* as to an *incorrigible rogue*, and confequently that the Seffions had power to order both defcriptions of offenders to be *whipped* and to be *paffed* after the expiration of their imprifonment.

Balguy faid in anfwer that the adjudication of one to be an *incorrigible rogue* of courfe comprehended him under the defcription of rogue and vagabond, being a higher defcription of offender of the fame fort; and therefore any fingle magiftrate out of feffions had the power of paffing him to his parifh after the expiration of his imprifonment. [Lord *Ellenborough* C. J. That is not fo clear; for the power of a magiftrate out of Seffions to pafs a rogue and vagabond feems connected with the punifhment of whipping or confinement which has been inflicted under *his own order*: for the 7th fection fays, "And *after fuch* "*whipping or confinment, fuch* juftice or juftices may and "are

" are hereby empowered, if they think fit, by a paſs under " hand and ſeal in the manner and form hereafter di- " rected to cauſe *ſuch perſons* to be conveyed, &c." It does not appear to refer to any independent order to paſs.] Secondly, the Seſſions have only adjudged the defendant *to be employed in his Majeſty's ſervice* after the expiration of his impriſonment, and they have not diſcriminated whether ſuch ſervice is to be *by ſea* or *land*, as mentioned in the act. This is part of the adjudication, and ought to be done at the ſame ſeſſions by which the reſt of the ſentence is pronounced. But even if this part of the puniſhment may be adjudged at any ſubſequent ſeſſions during the impriſonment, ſtill it can only be done once, and here it has been already done, but done defectively; and therefore the error cannot be rectified at any future ſeſſions.

Vaughan Serjt. contra, (being called upon to anſwer this laſt objection) relied on the words of the ſtatute, " that the juſtices at their ſeſſions may and are hereby " empowered *at any time before he is diſcharged from the* " *houſe of correction* to ſend him to be employed in his " Majeſty's ſervice, either by ſea or land, if they ſhall " judge proper." This was a diſcretionary power given and meant to be exerciſed or not according to circumſtances, ſuch as good behaviour during confinement, probability of amendment, or the like. But if it were not ſo, here is a ſufficient adjudication of the ſeſſions that *he ſhould be employed in his Majeſty's ſervice purſuant to the ſtatutes*, that is, either by ſea or land, as the crown or its officers ſhould think proper, or the ſubject be beſt adapted for. There is no neceſſity for limiting the diſcretion or convenience of the Crown in this reſpect. At

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any rate, ſuppoſing this part of the adjudication defective, it will not vitiate the reſt which is good.

Lord ELLENBOROUGH C. J. The judgment is entire and cannot be ſplit. A particular juriſdiction is given to the Seſſions; whenever they begin to act upon it and to make their order, they muſt make an effective order. Quacunque viâ datâ this is wrong, whether this direction to employ the offender in his Majeſty's ſervice is to be made part of the ſentence or not: if it were not to be part of the ſentence, the Seſſions have done wrong in making it ſo: if it were, they have not done it effectually, by not having aſcertained in which ſervice, whether at ſea or by land, the defendant was to be employed. The ſtatute certainly meant that the juſtices ſhould exerciſe their diſcretion in this reſpect, as well as in determining whether he ſhould be employed at all or not in the ſervice. Upon this ground we think the conviction cannot be ſuſtained. As to the other point, we do not think the objection well founded; for upon reading the clauſe we think that the words "*ſuch perſon*" refer to "*any offender* againſt the act" deſcribed at the beginning of the clauſe, who ſhall be committed to the ſeſſions. That is evidently the meaning in the firſt place where thoſe words occur in the clauſe; where it ſays that when "*any offender* againſt this act ſhall be committed, "&c. to the ſeſſions, and the juſtices at ſuch ſeſſions "ſhall, on examination, &c. adjudge *ſuch perſon* a rogue "or vagabond, or an incorrigible rogue, &c."

On the ſecond objection therefore

Per Curiam, Conviction quaſhed.

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Thurſday, June 7th.

Where the ſpiritual court incidentally determines any matter of common law cognizance, ſuch as the conſtruction of an act of parliament, otherwiſe than the common law requires, prohibition lies after ſentence; altho' the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below.

IN prohibition the plaintiff declared, that whereas the trial of the bounds of pariſhes and of preſcriptions and cuſtoms has immemorially been by the common law, and not by the eccleſiaſtical law; and that during the year 1797 and the two following years the plaintiff had occupied lands which were lately parts of a tract of waſte land called *King's Sedgemore* in the county of *Somerſet*, and which had been lately incloſed allotted and divided under an act of the 31 *Geo.* 3.; and which lands ſo occupied by the plaintiff until the allotting and dividing, &c. were not within the pariſh of *High Ham* in the ſaid county, or the titheable places thereof, but was extra-parochial. And that there is a ſaving in that act of the rights of the Crown. And that within the pariſh of *High Ham* there has been immemorially a modus of 2*d.* an acre for all meadow land, in lieu of tithe of hay and agiſtment, and of 1½*d.* for every milch cow depaſtured in ſuch land, in lieu of tithe of milk and agiſtment, and of 1*d.* for every heifer depaſtured on the ſame, in lieu of agiſtment tithe; yet the defendant, rector of the pariſh of *High Ham*, to aggrieve the plaintiff and diſinherit the Crown, and to bring the cognizance of a plea which belongs to the Crown to another ſort of trial in the conſiſtorial court of the archdeaconry of *Wells*, exhibited his libel in the ſaid court againſt the plaintiff, alleging that in the year 1797 and the two following years the defendant was rector of *High Ham* and the proprietor of the tithes, and that the plaintiff during that time occupied the ſaid meadow lands in the

(*a*) Vide the report of this caſe on the motion for the prohibition, 3 *Eaſt*, 472.

ſaid

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ſaid pariſh, and mowed and received the hay therefrom, and depaſtured unprofitable cattle there, and ploughed the ſaid other lands there and ſowed them with corn, for which tithe was due to the defendant. That the plaintiff pleaded in his defence to the libel the matters above ſuggeſted, and offered to prove the ſame by evidence. That the defendant by way of perſonal anſwer denied that the ſaid lands were extra-parochial, becauſe the proprietors of lands in the adjoining pariſhes, of which *High Ham* was one, claimed rights of common on *King's Sedgemoor*, as appurtenant to their reſpective tenements, and that *King's Sedgemoor* was parcel of the ſaid ſeveral pariſhes adjoining, though the preciſe bounds of each were not certainly known. And further the defendant alleged, that *King's Sedgemoor* was not mentioned in the ſaid act as extra-parochial, but that the ſame was therein ſtated to be in, near, or adjoining to the ſeveral pariſhes mentioned, of which *High Ham* was one; and that the commiſſioners under the ſaid act allotted *King's Sedgemoor* amongſt the ſeveral pariſhes mentioned, which had rights of common thereon; and that they allotted part of *King's Sedgemoor*, adjoining to the old incloſures of *High Ham*, to the ſaid pariſh, for the rights of common appurtenant to certain tenements in *High Ham*, and other part of *King's Sedgemoor* they allotted to *Low Ham*, alleged to be a hamlet of *High Ham*. That the defendant by his ſaid anſwer further alleged, that by an act of the 37 *Geo.* 3. the parcels of meadow and land in queſtion in the occupation of the plaintiff were allotted in reſpect of ſome of the rights of common appurtenant to ſome of the tenements in the pariſh of *High Ham* and hamlet of *Low Ham*, and were parcels of the allotments made under the laſt-mentioned acts; and that the ſame were within the bounds of the

pariſh

pariſh of *High Ham*. And the defendant further alleged, that by the ſaid act ſecondly abovementioned it was enacted, that all the lands which ſhould be allotted by virtue thereof ſhould be held under and ſubject to the ſame charges, tenures, cuſtoms, ſuits, ſervices, and incumbrances as the tenements in reſpect of which ſuch allotments were made would have been ſubject to if ſuch act had not paſſed. And the defendant further ſubmitted by his anſwer, that under the ſtat. 2 & 3 *Ed.* 6. the rector of *High Ham* was entitled to the tithe of increaſe of cattle depaſtured in the ſaid tract of paſture land prior to the paſſing of the firſt-mentioned act; and that the defendant denied the modus. Yet notwithſtanding the matters alleged, the defendant had cauſed the plaintiff to be convicted of the premiſes, and the plaintiff had been condemned by the ſpiritual court in a large ſum to be paid to the defendant in lieu of tithe, &c.; and the defendant ſtill proſecutes his ſuit in the eccleſiaſtical court, &c. To this the defendant demurred generally, and the plaintiff joined in demurrer.

Dampier, in ſupport of the demurrer, contended, 1ſt, that it was too late to call for a prohibition *after* ſentence on the ground that the eccleſiaſtical court had tried the boundary of the pariſh, or the exiſtence of a modus. For though theſe are queſtions properly triable by a jury, and the plaintiff might before ſentence have come here and ſtopped the trial in the eccleſiaſtical court; yet as that court has *juriſdiction* of ſuch queſtions incidentally, (for the queſtion of parochial boundary may ariſe in every cauſe of ſubſtraction of tithe), and the objection goes only to the defect of *trial*, the plaintiff, after ſubmitting to the trial there, and taking his chance of a deciſion in his

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his favour, cannot object to it. *Full* v. *Hutchins* (*a*), *Argyle* v. *Hunt* (*b*), *Banniſter* v. *Hunt* (*c*), *Blaquiere* v. *Hawkins* (*d*), *Symes* v. *Symes* (*e*), *Buggin* v. *Bennett* (*f*), *Offley* v. *Whitehall* (*g*), and 2 *Roll. Abr.* 209. *pl.* 2. All the caſes ſhew, that where the eccleſiaſtical court has *original* juriſdiction of the cauſe (as here it muſt be admitted to have had), and nothing appears upon the face of the *libel* to ouſt it, prohibition does not lie after ſentence merely for defect of trial. This diſtinguiſhes the preſent caſe from *Vanacre* v. *Spleen* (*h*), where the objection appeared on the face of the libel; as it alſo did in *Paxton* v. *Knight* (*i*), where the party had libelled upon a preſcription over which the eccleſiaſtical court had no juriſdiction. The authority of that caſe, however, is oppoſed to the caſe in 1 *Ld. Ray.* 435. And in *Dutens* v. *Robſon* (*k*), though the party libelled upon a modus, yet that being admitted, a prohibition was denied. And by *Argyle* v. *Hunt* (*l*), the party applying for a prohibition ſhall not, after ſentence at leaſt, allege matter dehors the libel to ſhew that the court below had not juriſdiction. But, ſecondly, ſuppoſing prohibition will in any caſe lie after ſentence in a matter originally within the juriſdiction of the eccleſiaſtical court, the queſtion will be, whether the conſtruction of acts of parliament belong in all caſes to the temporal courts excluſively; ſo that if the eccleſiaſtical or admiralty courts conſtrue them otherwiſe than the temporal courts would have done, prohibition ſhall go even after ſentence; or whether thoſe courts have not juriſdiction to conſtrue acts incidentally coming under their cognizance in matters

(*a*) *Cowp.* 422. (*b*) 1 *Stra.* 187. (*c*) 10 *Mod.* 12.
(*d*) *Dougl.* 378. octavo edit. (*e*) 2 *Burr.* 813.
(*f*) 4 *Burr.* 2035. (*g*) *Bunb.* 17. (*h*) *Carth.* 33.
(*i*) 1 *Burr.* 314. (*k*) 1 *H. Blac.* 100. (*l*) 1 *Stra.* 187.

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within their juriſdiction, whoſe deciſion thereon, however erroneous, can only be rectified on appeal. It may be admitted, that wherever the rule of the eccleſiaſtical law is directly different from that of the common law, and muſt neceſſarily lead to a different reſult, the latter is entitled to the preference; and prohibition may go even after ſentence; as where the eccleſiaſtical court requires proof by two witneſſes of matters proveable by one at common law: though prohibitions even in this caſe have been denied (*a*). Or where the queſtion ariſes on the meaning of the words "*next of kin.*" 2 *Rol. Abr.* 303. *pl.* 28.: or on the extent of the word *month*, in matters not ſpiritual. In theſe caſes the conſtruction of the reſpective courts muſt neceſſarily be different. So prohibition will go at any time if an inferior court miſconſtrue an act regulating its own juriſdiction. 12 *Rep.* 42. And this was the ground of the doctrine laid down in *Brymer* v. *Atkins* (*b*). There the prize court had put a conſtruction on the ſtat. 16 *Geo.* 3. *c.* 5. *ſ.* 14. which the court of *C. B.* conſidered that the prize court had authority to do, and did not prohibit it. And yet if the conſtruction put by inferior courts on acts of parliament be not binding any further than as it coincides with the judgment of the courts at *Weſtminſter*, it is in effect to deny their juriſdiction; for an erroneous judgment upon a matter within the juriſdiction of a court can only be rectified on appeal. But if the matter were coram non judice, the prize court could have had no authority to put any conſtruction on the ſtatute, and it muſt have been prohibited in the firſt inſtance. The ſpiritual court may have juriſdiction of matters coming incidentally in queſtion there where it

(*a*) *Robert's* caſe, 2 *Cro.* 269. *Sid.* 161. 2 *Rol. Abr.* 279. *pl.* 10.

(*b*) 1 *H. Blac.* 164. 187, 8.

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would not have had original jurisdiction over such matters. *Reg.* 57. *b.* 58. So it may judge of a statute. 2 *Rol. Abr.* 307. *pl.* 16. *Pen*'s case, *M.* 8 *Jac. ib.* 308. *pl.* 22. *Lucy* v. *Lucy*, *H.* 14 *Car.* There a parson sued for tithes in the spiritual court against one who pleaded a lease for years made to him by the parson; to which the latter replied that he was in such a year absent from his benefice above 80 days, by which his lease became void. And held that no prohibition lay on this plea, although grounded on the stat. 13 *Eliz.*; and though it was objected that the judges of the spiritual court should not have the exposition of a statute. Dr. *Sutton*'s case (*a*), and *Scadding*'s case (*b*) are to the same effect. [Lord *Ellenborough* C. J. It will not, I apprehend, be contended that the ecclesiastical court has not jurisdiction to construe statutes incidentally coming in question before them; but only that if it construe them wrongly a prohibition shall go. The resolution of the Judges in the reign of *Jac.* 1. does not go further than this.] All the authorities have been lately considered in the cases of *Brymer* v. *Atkins*, and *Home* v. *Lord Camden* (*c*). What was said by Lord *Loughborough* in the latter, "that the exposition of the statute law appertains to the King's courts of record, and ought to be discussed and determined in those courts," must be understood with reference to what was said by his lordship in *Brymer* v. *Atkins* (*d*), where he states that the misconstruction by a prize court of an act of parliament by which its jurisdiction was regulated

(*a*) *Latch.* 228. *Cro. Car.* 65. (*b*) *Yelv.* 134.

(*c*) The first report of this case is in 1 *H. Blac.* 476., where the Court of *C. P.* gave judgment for the plaintiff in prohibition; the next, in 4 *Term Rep.* 382., where that decision was reversed by *B. R.*; and again in 2 *H. Blac.* 539., where the judgment of *B. R.* was affirmed in *Dom. Proc.*

(*d*) 1 *H. Blac.* 187, 8.

would

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would be a good ground of prohibition, on an ancient and eſſential maxim of the common law, "that all courts of ſpecial juriſdiction created by act of parliament muſt be limited in the exerciſe of that juriſdiction by ſuch conſtruction as the courts of common law may give to the ſtatutes; becauſe if they had a latitude to conſtrue at their diſcretion the law by which they act, they would ſet themſelves above the common law." In the caſe of *Home* v. *Lord Camden*, where the judgment of *B. R.* denying a prohibition to the prize court of appeals was ultimately ſuſtained by the Houſe of Lords, the reaſons given by *Aſhhurſt* (*a*) and *Buller* Juſtices (*b*), and particularly by the latter, are deciſive againſt the prohibition. The former ſaid, "It is admitted that the courts of Admiralty have *excluſive* juriſdiction over all queſtions of prize; and *if ſo*, they muſt have the ſame juriſdiction over all matters that ariſe incidentally, *either in conſtruing acts of parliament* or proclamations, in order to form their opinion on the principal queſtion." *Buller* J. ſaid, that "if it were competent to us to decide whether or not the court of appeals had miſconſtrued the act, I ſhould deſire further time to look into the authorities. But I think it is not now competent to the court to examine that queſtion," &c. He afterwards ſtates it "as a clear rule, that *after* ſentence the courts of common law never grant a prohibition, unleſs the want of juriſdiction appear on the face of the libel:" for which he refers to *Full* v. *Hutchins* (*c*). Then after referring to the dictum in 2 *Rol. Abr.* 306. *pl.* 10. that if the eccleſiaſtical court *adjudge otherwiſe* (upon a condition in a leaſe) *than is warranted by the common law, a prohibition will be granted*; which he denies it to be law; he proceeds to touch upon the merits of the deci-

(*a*) 4 *Term Rep.* 395. (*b*) *Ib.* 396, 7. 400. (*c*) *Cowp.* 422.

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sion in the court below: and his opinion is the stronger; because he seems to have differed from the court of appeals in their construction of the act. The dictum in *Rolle* and some few ancient cases have certainly gone great lengths; but they are attributable to a jealousy of the ecclesiastical courts which at one time prevailed in the courts of common law, and justify the observation of Ld. C. J. *Vaughan* (*a*), "that this Court had in some of the cases bordered on things spiritual." And the inclination of Ld. C. J. *Eyre*'s opinion to the same purpose may be collected from the manner of his stating the question in *Home* v. *Ld. Camden* (*b*). The strength of the argument on the other side rests on the inconvenience there pointed out by Ld. C. J. *Eyre*, namely, the possibility of two different rules prevailing on the same law, one in the courts of *Westminster*, the other in courts of peculiar jurisdiction, where the tribunals in the ultimate resort are not the same. But this inconvenience exists in other cases, and is not therefore a conclusive objection. As where the courts of equity and the spiritual courts have a concurrent jurisdiction in matters of tithe and matters of legacy. Or, as where the courts of Admiralty and of common law have concurrent jurisdiction in the case of mariners' wages, where the contract is made at sea and is not under seal, and in bonds of hypothecation which are under seal. So the plantation courts of Chancery in matters arising there, and the court of Chancery here, where the parties live in *England*, have concurrent jurisdiction (*c*), though the ultimate appeal from the one is to the King in council, and not to the House of Lords, as in the case of the other. The same took place formerly on contracts of marriage, before the jurisdiction of the spiritual court was taken

(*a*) 2 *Ventr.* 10. (*b*) 2 *H. Blac.* 535. (*c*) *Salk.* 404.

away

away by the ſtat. 26 *Geo.* 2. *c.* 33. *ſ.* 13.: and other inſtances are enumerated in *Bac. Abr. Prohibition*, L. 5. None of theſe concurrent juriſdictions could exiſt if the poſſibility of conflicting deciſions were an objection. And ſuch objection is alſo inconſiſtent with the law as now ſettled in *Full* v. *Hutchins* (*a*), that a party is too late who comes after ſentence for a prohibition where the defect in the court chriſtian is in the *trial* and not in the *juriſdiction*. So where two libels are exhibited againſt two inhabitants of a pariſh for tithe, and they ſet up a modus over the whole pariſh, if one ſubmit to the trial in the court chriſtian, and the other obtain a prohibition before trial and try at common law, the one caſe may be ultimately decided before the delegates, and the other by the Houſe of Lords, who may decide differently. But this inconvenience cannot alter the law. [Lord *Ellenborough* C. J. and *Le Blanc* J. obſerved, that there the inconvenience would ariſe from the party's own fault, who did not apply in time for a prohibition.] In *Hill* v. *Good* (*b*) Lord C. J. *Vaughan* takes a diſtinction, which is confirmed in *Wenmouth* v. *Collins* (*c*) between ſtatutes which give a new juriſdiction to the temporal courts, and thoſe which are directory to the juriſdiction which before had cognizance of the ſubject. In the latter caſe the court will not prohibit the eccleſiaſtical court from proceeding, though the conſtruction of the ſtatute may come in queſtion. Now here the acts in queſtion do not alter the juriſdiction; they confirm to all the ſame rights they had before. The *Sedgemoor* act ſtates the moor to be near the pariſhes, and makes the allotments parts of the pariſhes where the tenements in reſpect of which they were made are ſituated; and it ſaves the right of the King. The

(*a*) Coup. 422. (*b*) Vaugh. 304. (*c*) 2 Ld. Ray. 850.

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High Ham act makes the part thereby incloſed ſubject to the ſame charges it was before. The ſtat. 2 & 3 *Ed.* 6. *c.* 13. *ſ.* 3. makes the tithe of increaſe of cattle on any lands of which the pariſh is not known payable to the rector of the pariſh where the owner of the cattle reſided. Neither of theſe ſtatutes gives the temporal courts any new juriſdiction, nor alters or affects any juriſdiction which the eccleſiaſtical court had before; but the directions are general, and muſt be taken with reference to the court which had juriſdiction of the ſubject matter before. At any rate, however, before prohibition is granted it ought certainly to appear, which it does not, that the eccleſiaſtical court neceſſarily decided this caſe on the conſtruction of the ſtatutes: after ſentence the plaintiff cannot complain of the defect of trial of the modus or boundary. The ground of its deciſion might be that *Sedgemoor* was not extraparochial, and in that caſe the King had no right. This would not be conſtruing the act, but deciding on a fact. The ſum given may have been for the tithes of increaſe of cattle under the ſtat. 2 & 3 *Ed.* 6. which creates ſuch a charge, and the ſtat. 37 *Geo.* 3. which maintains it, even ſuppoſing the pariſh to which the moor appertains to be uncertain. It is not alleged by the eccleſiaſtical court that theſe lands were extraparochial before the act, and were only brought within the pariſh by its operation, in which caſe it might be ſaid that the ſaving of the King's right (if it were not previouſly granted away) ought to operate.

Burrough contrà. The ſtatute in queſtion cannot be ſaid to be directory to the eccleſiaſtical court, wherein no mention is made of that juriſdiction, but which merely contains general proviſions, which muſt of courſe be taken to

apply

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apply to the courts of common law. Neither can it be ſaid that the eccleſiaſtical court has not proceeded to adjudge tithe to the rector upon the conſtruction of the *Sedgemoor* act, as bringing the allotments within the pariſh; for the place, which was before alleged to be extraparochial, is denied to be ſo by the rector in his anſwer, *becauſe* the inhabitants of the pariſh of *High Ham* claimed rights of common on *King's Sedgemoor*, which was parcel of the ſeveral pariſhes adjoining, and that *the act* did not mention it to be extraparochial, and that the allotments *under the act* were made in reſpect of ſuch rights of common *appurtenant to the tenements in the pariſh*, &c.; and that the act of the 37 *Geo.* 3. ſubjected the allotments to the ſame *charges*, &c. as the tenements in reſpect of which they were made; evidently putting the whole caſe upon the acts as having virtually made thoſe allotments parts of the pariſh, and ſubject to the ſame burthens as the old incloſures. Now the only object of the *Sedgemoor* act was the diviſion of the moor between the lords of manors and the commoners claiming rights thereon before the ſtatute, and nothing is ſaid reſpecting the right to tithe, which is therefore left as it was before. No *parochial* rights were ever before exerciſed on the moor, nor does the act ſtate it to be within the boundaries of any pariſh, but *lying near* or *adjoining*; though by way of diſtinction the ſeveral parts are allotted to particular pariſhes. Then the clauſe in the *High Ham* act, 37 *Geo.* 3. directing the allotments to be ſubject to the ſame "*charges*" as the old tenements in reſpect of which they were made, merely relates to private charges, &c. on the eſtate, ſuch as dower, mortgages, &c. according to *Moncaſter* v. *Watſon* (*a*), and does not relate to tithe; the rectors of the

(*a*) 3 *Burr.* 1375.

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ſeveral pariſhes being no parties to the act, but merely the Lords and Commoners; and the accompanying words, ſuch as uſes, eſtates, truſts, &c. explain the meaning of the word *charges*. [*Lawrence* J. A ſimilar clauſe in the caſe of the *Stonehouſe Bridge* act lately (*a*) received the ſame conſtruction.] Then the laſt clauſe but one ſaves to the lords of the manors all their privileges, except ſuch for which compenſation was made, and which were intended to be barred by the act, namely, common of paſture. And the laſt clauſe ſaves all the King's right and title with the ſame exception. Now if any perſon were before entitled to the tithe of the allotments which were extraparochial, it muſt have been the King. It is clear therefore that the eccleſiaſtical court in giving the rector the tithe of ſuch allotments has miſconſtrued the acts, the interpretation of which belongs excluſively to the courts of *Weſtminſter*, and therefore the miſconſtruction of them is a good ground of prohibition after ſentence: the ſentence itſelf is the gravamen; for till then it could not be known that the court below would miſconſtrue the acts. The current of authorities from the time of *James* the firſt to that of the doubt expreſſed by *Buller* J. in *Lord Camden* v. *Home*, in Error (*b*), (which doubt was not warranted by the authorities then mentioned, and upon further inveſti-

(*a*) *H.* 44 *Geo.* 3. *B. R.* That was a caſe ſent up from the Court of Quarter Seſſions in *Devonſhire*, upon a queſtion concerning the validity of a poor rate. The ſtat. 7 *Geo.* 3. for building *Stonehouſe Bridge*, by *ſ.* 19. exempted it from "the land-tax or any other public or parochial rate or tax "whatſoever;" and by *ſ.* 20. provided that certain perſons and their heirs ſhould ſtand ſeiſed of the tolls of the bridge "to the ſame uſes, truſts, and "eſtates, and ſubject to the ſame wills, ſettlements, limitations, remain-"ders, *charges*, tenures, rents, and incumbrances" as the ferry was in lieu of which the bridge was erected. And held that the word *charges* only extended to *private* charges on the eſtate.

(*b*) 4 *Term Rep.* 396, 7.

gation

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gation would probably have been removed from the mind of the learned Judge), ſhews that where the eccleſiaſtical court acts contrary to the rules of the common law in any matter of common law cognizance, ſuch as the conſtruction of acts of parliament, the courts of *Weſtminſter* will prohibit it. This was the expreſs deciſion of the court in the caſe cited by the ſame Judge from 2 *Rol. Abr.* 306. *pl.* 10. and it is confirmed by other authorities. Where indeed the objection is only to the *trial*, it is the fault of the party if he do not apply before ſentence; and *non conſtat* but that the Court below may have decided wrong on the fact, and not on the law; but where the ſentence is the grievance, he can never come too late. The doctrine referred to as laid down by Lord *Loughborough* in *Home* v. *Lord Camden* (*a*), "that the expoſition of the ſtatute law appertains to the king's courts of record, and ought to be diſcuſſed and determined in thoſe courts," is not new, but is confirmed by the whole court in *Howe* v. *Nappier* (*b*). That was a ſuit in the Admiralty for ſeamen's wages, there being an agreement under ſeal; on which a prohibition went. Lord *Mansfield* there ſaid, "a prohibition is ex debito juſtitiæ if the Court of Admiralty proceed contrary to act of Parliament." The true queſtion in theſe caſes is, Whether the court below are proceeding againſt the common law? If the ſentence itſelf ſtated that the court had decided againſt a preſcription ſet up in a ſuit for ſubſtraction of tithe on the ground that it was not proved by more than one witneſs, this court would interfere by prohibition even after ſentence. In *Wheeler's* caſe (*c*), the eccleſiaſtical court had juriſdiction over the ſubject matter, namely, the working upon holidays, yet as it had miſconſtrued the ſtat. 5 *Ed.* 6. diſregarding the exception

(*a*) 1 *H. Blac.* 476. (*b*) 4 *Burr.* 1950. (*c*) *Godb.* 218.

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of works of neceſſity, ſuch as carrying hay, prohibition went. Admitting that the church had authority to appoint holidays, and to puniſh the breakers thereof; the court ſaid that the feaſt of St. John Baptiſt was a holiday *by act of Parliament; and therefore it did belong unto the judges of the law* whether the ſame were broken by doing ſuch work on that day. So where the Judge of the prerogative court had on granting adminiſtration to one *Slawney* (*a*), taken bond of him with the conditions uſual there, but beyond what was required by the ſtat. 21 *H.* 8. *c.* 5.; on prohibition prayed againſt proceedings there on that bond this court was clear that the prerogative court could not impoſe any other condition than the ſtatute required; "for they muſt take their bond according to the law; and when it is ſued the meaning and expoſition of the ſtatute, and of the condition of the obligation both are *to be judged by the courts of common law.* Again in Sir *W. Juxon* v. Lord *Byron* (*b*), where the eccleſiaſtical court had incidentally put a conſtruction upon a private act of Parliament, in which this court agreed and therefore denied a prohibition; Lord *Hale* and the whole court agreed, "that the ſpiritual court, though they may try matters cognizable at common law which fall in incidentally where the principal is eccleſiaſtical, yet they ſhall be prohibited if they proceed in the trial of ſuch incident temporal matter *otherwiſe than the common law would.*" In *Carter* v. *Crawley* (*c*) prohibition went becauſe the ſpiritual court had miſconſtrued the words of the ſtatute of diſtributions. And in *Berkeley* v. *Morrice* (*d*), where the Admiralty Court were prohibited for refuſing to receive a plea of the ſtatute of limitations,

(*a*) *Hob* 83.
(*b*) 2 *Lev.* 64.
(*c*) *T. Ray.* 496.
(*d*) 1 *Hardr.* 502

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in a ſuit for an account between the captain and owner of a merchant ſhip, this Court ſaid, that it was a good cauſe of prohibition if they did receive the plea and did not give ſentence thereupon *as the common law requires*. Prohibition alſo went in *Pierce* v. *Hopper* (*a*) upon the miſconſtruction of the pilot act, 3 *Geo.* 1. *c.* 13. There is no caſe over which the eccleſiaſtical court have clearer juriſdiction than in matters of probate; and yet where they had revoked a probate becauſe the executor had become bankrupt, this Court in *Adriel Mill's* caſe (*b*) granted prohibition *after ſentence and appeal*. So it was done in *Rebowe* v. *Bickerton* (*c*). In *Buggin* v. *Bennett* (*d*) prohibition was denied, not becauſe it was applied for *after ſentence* in the Admiralty, but becauſe the ſuit being for ſeamen's wages, it did not expreſsly appear that the contract was by deed on land: but it was admitted that if that had been ſhewn prohibition would have gone even after ſentence: and yet the objection would not have appeared on the face of the libel. The ſame obſervation will apply to other caſes. In *Driver* v. *Colegate* there cited (*e*), the modus ſet up being admitted, and the ſpiritual juriſdiction continuing over the original cauſe of ſuit, there was no neceſſity for a prohibition: but no conſent will give them juriſdiction where the law does not: and if the want of it appear in any of the proceedings, prohibition lies. The true rule is laid down in *Slotter* v. *Friend* (*f*), that where the ſpiritual court have cognizance of the principal, they ſhall have cognizance of the incidents and acceſſaries; but if the incident be a matter merely temporal, they muſt proceed there according to the courſe of the common law, and not ſecundum jus eccleſiaſticum. And by the report in *Salkeld* it is not too

(*a*) 1 *Stra.* 249. (*b*) *Skin.* 299. (*c*) *Runb.* 81.
(*d*) 4 *Burr.* 2035. (*e*) *Ib.* 2040. (*f*) *Carth.* 142 and *Salk* 547.

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late to come for a prohibition after ſentence; *for the ſentence in that caſe is the grievance.* And this agrees with *Forſon* v. *Scott* (*a*). He alſo referred on this head to the anſwers of the Judges on the great controverſy in 1604, 2 *Inſt.* 613, 614. *anſwer to object.* 20.; to Lord C. J. *Vaughan*'s judgment in *Hill* v. *Good* (*b*); and to that of Lord C. J. *Eyre* in *Lord Camden* v. *Home*, (*c*) in *Dom. Proc.* Secondly, he contended that the eccleſiaſtical court had no juriſdiction to determine on the boundaries of pariſhes; that they had done ſo in this caſe, and therefore might be prohibited after ſentence as well as before. For which he cited *Keilw.* 110. *b.* 13 *Rep.* 17. 2 *Inſt.* 599. 1 *Bulſtr.* 159. *Foſter* v. *Hide*, 1 *Rol. Rep.* 332. 17 *Vin. Abr.* 581. *Prohibition*, L. 1. *Phillips* v. *Stacke*, *Noy*, 147. *Frezewell*'s caſe, 2 *Rol. Abr.* 319. *Hains* v. *Jeſcot*, *Comb.* 356. *Butler* v. *Yateman*, 1 *Sid.* 89. 5 *Bac. Abr. Prohibition*, 663. H. 18 *Vin. Abr.* 28., and 1 *Gibſ. Codex*, *tit.* 9. *ch.* 13. *fo.* 239.

Dampier in reply ſaid, that the laſt objection as to the queſtion of boundary went to the defect of *trial* only, and not of *juriſdiction*; and therefore unleſs that diſtinction were wholly done away, which was recognized in ſeveral of the later caſes, the objection ought to have been made before ſentence; and if the trial in the eccleſiaſtical court were ſubmitted to, it was no ground for prohibition. In *Frezewell*'s caſe, 2 *Rol. Abr.* 319. *pl.* 2. which is the ſtrongeſt authority the other way, being *after* trial, non conſtat but that the defect of juriſdiction might have appeared on the face of the libel: and it is, beſides, ſuggeſted that the king's right came in queſtion, where the

(*a*) *Sayer*, 176.

(*b*) *Vaugh.* 304. and vi. *Harriſon* v. *Burwell*, *ib.* 220. and 2 *Ventr.* 15—20.

(*c*) 2 *H. Blac.* 533.

maxim

maxim of nullum tempus occurrit regi would apply. And it alſo ſeems to have been queſtioned by Lord *Holt*, in *Hains* v. *Jeſcot* (*a*). As to the principal ground of objection, the ſuppoſed miſconſtruction of the acts of parliament, he admitted that there was a contrarity of authorities, but contended that in principle the miſconſtruction of an act, reſpecting a ſubject matter over which the eccleſiaſtical court had either an immediate or incidental juriſdiction, was only ground of appeal, and not of prohibition, according to the opinion of *Aſhhurſt* and *Buller* Juſtices, in Lord *Camden* v. *Home*, where the former deciſions were reviewed. That the authorities to the contrary were chiefly dicta, or elſe were caſes where the objection after ſentence appeared either on the face of the libel, or aroſe on the conſtruction of acts of parliament giving limited juriſdiction to the courts below, within which they were to be reſtrained; or where the different rules of the temporal and ſpiritual courts touching the ſubject matter neceſſarily led to a different reſult. But here it did not even diſtinctly appear that the eccleſiaſtical court had founded its ſentence on the conſtruction of the acts of parliament, much leſs that any difference of the law of that court, as applied to the ſubject matter, muſt neceſſarily have led to a different conſtruction than what would have prevailed in the temporal courts.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment.

This comes before the Court on a demurrer to a declaration in prohibition. The plaintiff applied to this Court for a prohibition to prohibit the conſiſtorial court of the archdeacon of *Wells* from further proceeding in a ſuit there inſtituted

(*a*) *Comb.* 356.

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ſtituted by the defendant *Gapper* againſt him for tithes of land in *High Ham*; and he grounded his claim to the writ of prohibition on this, that the eccleſiaſtical court had decided in favour of the rector's claim to tithe, by conſtruing the acts made for dividing, allotting, and incloſing *Sedgemoor*, as making a part of that moor, to be within the pariſh of *High Ham*, which before was extraparochial, and that in ſo doing the eccleſiaſtical court had miſconſtrued the acts of parliament. On ſhewing cauſe againſt the rule for a prohibition in *Eaſter Term* 1803, it appeared to the Court a proper ſubject for a further and more ſolemn diſcuſſion, and the parties were therefore directed to declare in prohibition.

The objections to granting a prohibition in this caſe are, 1ſt, That it is too late after ſentence. 2. That miſconſtruction of a ſtatute is matter of appeal, and not of prohibition. In ſupport of the firſt objection it is ſaid, that if the defect of the original juriſdiction do not appear on the face of the libel, but the objection to the proceeding of the eccleſiaſtical court ariſes out of ſome matter incidentally occurring, it comes too late after ſentence. And further, that in this caſe it does not appear neceſſarily that the eccleſiaſtical court decided on the conſtruction of the incloſure acts, but might have proceeded on other grounds to try the boundaries of the pariſh: and that after the party's ſubmiſſion to have that queſtion tried by the ſpiritual court, he ſhall not, when it has been decided againſt him, apply for a prohibition. And in ſupport of theſe poſitions, 2 *Roll. Abr.* 290. *pl.* 2. *Offley* v. *Whitehall*, *Bunb.* 17. *Argyle* v. *Hunt*, 1 *Str.* 187., the caſe of *Market Boſworth*, in 1 Ld. *Raym.* 435, and *Full* v. *Hutchins*, *Cowp.* 422. were relied on. But as to this

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this firſt objection, we cannot ſuppoſe that the eccleſiaſtical court proceeded on any other grounds than the conſtruction of the incloſure acts; becauſe, in anſwer to the plea of the plaintiff, in prohibition, that the place, in reſpect of which the tithe was claimed, was "extra paro-"chial," the defendant has no otherwiſe denied that allegation, than by argumentatively contending that becauſe the owners of the lands in the ſeveral pariſhes adjoining *Sedgemoor* were in reſpect thereof entitled to common of paſture on that moor, therefore *Sedgemoor* was part of ſuch ſeveral adjoining pariſhes, (although the boundaries of each pariſh were not certainly known); and alſo by ſtating the ſtat. 31 *Geo.* 3., which is the act for draining and dividing the moor; the allotment of the commiſſioners; and the ſtat. 37 *Geo.* 3. which is an act for dividing and allotting, *inter alia*, ſo much of *Sedgemoor* as had been allotted to the pariſh of *High Ham* in reſpect of rights of common claimed by the owners of land in that pariſh. So that it is certain that the eccleſiaſtical court had no ground whatever ſubmitted to them whereupon to exerciſe their judgment, or from which they could conclude that the places in reſpect whereof the tithe is claimed were certain and defined parts of the pariſh of *High Ham* but theſe two acts of parliament, and the conſtruction and effect belonging to the ſame. The authorities cited certainly do not eſtabliſh, that in no caſe a prohibition ſhall be granted after ſentence, unleſs a want of juriſdiction appear on the face of the libel; for in the caſe of *Full* v. *Hutchins*, which was moſt relied on, a diſtinction which applies expreſsly to this caſe is taken between *prohibitions granted for the ſake of trial*, which are not granted after ſentence, and prohibitions, which not being granted before ſentence to ſtay trial, becauſe matters

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ters triable at the common law have incidentally ariſen, will, nevertheleſs, be granted if the eccleſiaſtical court proceed to try ſuch matters contrary to the principles and courſe of the common law: and, as an inſtance of the Court's ſo prohibiting, Ld. *Mansfield* mentions *the conſtruction of an act of parliament*. In ſuch caſes no prohibition can go before ſentence; for till ſentence be given the courts of common law have no reaſon to ſuppoſe that the eccleſiaſtical court will determine wrong; which, however, if it ſhould do, it is not too late to come then, that is, *after* ſentence, for a prohibition; for *the ſentence* is in ſuch caſe the *gravamen*; and ſo it was expreſsly ſtated to be by *Holt*, C. J. and the Court in *Shotter* v. *Friend*, *Salk.* 547.

This brings us to the next point, Whether the ſtatutes of the 31 & 37 *Geo.* 3. have been, in the preſent inſtance, miſconſtrued? and if miſconſtrued, then that queſtion which is the ſubject of the ſecond objection ariſes, namely, Whether ſuch miſconſtruction be a ground for *prohibition*, or merely of *appeal*? As to the actual miſconſtruction of theſe ſtatutes, it will not be neceſſary to ſay any thing; for the counſel for the defendant has not even argued that the effect of them was to make the allotments part of the pariſh of *High Ham*.

The laſt queſtion, therefore, which is certainly a conſiderable one, alone remains to be diſcuſſed. If this were a queſtion which came now for the firſt time to be conſidered, we might incline perhaps to think it ſhould be deemed matter of *appeal* rather than of *prohibition*, according to the opinion of Mr. J. *Buller* in *Heme* v. *Ld. Camden*, 4 *Term Rep.* 397, where he ſays, "if the

court below have jurisdiction over the subject, though they mistake in their judgment, it is no ground for prohibition, but only matter of appeal." But, considering the current of authorities from the earliest times down to the period when that case came before the Court (the authority of which, as to that point, received, it will be recollected, no confirmation in the House of Lords; the point itself not being necessary to be decided in order to the determination of the case then in judgment): and remembering also, that in that very case, (reported in 1 *H. Blac.* 515.,) as also in *Brymer* v. *Atkyns*, 1 *H. Bl.* 164. & 188., Lord *Loughborough* and the other Jugdes of the Court of C. B. clearly considered the misconstruction of an act of parliament as ground of prohibition: adverting, I say, to these authorities and circumstances, we cannot feel ourselves warranted in holding, that the grounds of granting prohibitions are so narrow and limited as to be confined solely to cases of excess of jurisdiction. Mr. J. *Blackstone*, in the third volume of his *Commentaries*, *c.* 7., speaking of the writ of prohibition, says, that "it may be directed to the courts christian, "the university court, &c. where they concern themselves with any matter not within their jurisdiction: "*or if, in handling matters clearly within their cognizance*, "they transgress the bounds prescribed to them by the "laws of *England*; as where they require two witnesses "to prove the payment of a legacy; in such cases also a "prohibition will be awarded. For as the act of signing a "release or actual payment is not properly a spiritual "question, but only allowed to be decided in those "courts, because incident or accessary to some original "question, clearly within their jurisdiction, it ought "therefore, when the two laws differ, to be decided, not "according

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" according to the ſpritual, but the temporal law; elſe " the ſame queſtion might be determined different ways, " according to the court in which the ſuit is depending; " *an impropriety which no wiſe government can or ought to* " *endure; and which is therefore a ground for prohibition.*" This opinion of Sir *William Blackſtone* ſeems to be the fair reſult drawn from a great variety of caſes in which prohibitions have been granted, and where the eccleſiaſtical court had moſt undoubtedly cognizance, but had determined matters of the common law, incidentally ariſing, in a manner different from that in which the courts of common law would have decided the ſame points. And that ſuch are proper grounds of prohibition has been alſo allowed by the moſt conſiderable Judges who have at different periods ſat in *Weſtminſter Hall*. It will be ſufficient ſhortly to mention ſome of them. In 2 *Roll. Abr.* 301. *pl.* 11. it is ſtated that if a woman, after a divorce a menſa et thoro, ſue in the eccleſiaſtical court for a legacy given to her, and the releaſe of the Baron be pleaded and diſallowed, a prohibition ſhall be granted. In *Baſtard* v. *Studley*, 2 *Lev.* 209., a legacy was left to *A.* and *B.*; *A.* died, and the executor of *A.* ſued in the ſpiritual court for *A*'s ſhare; there being no ſurvivorſhip in ſuch caſe by the law eccleſiaſtical; whereupon *B.* ſued a prohibition: and, upon argument, it was adjudged that the prohibition ſhould ſtand. And Lord Chief Baron *Comyns* in his *Digeſt*, tit. *Prohibition*, *G.* 23. introduces this caſe, by ſtating as a rule of law the concluſion which reſults from it, viz. that *prohibition ſhall go*, " *if a ſuit in the ſpiritual court be determined contrary to the right at common law.*" In 1 *Roll. Rep.* 12. in a ſuit for tithe, an award was pleaded, and prohibition moved for, as this was a matter triable at law; but denied. And the Court ſaid,

if

if the ſpiritual court have cognizance of the principal, they ſhall have it of the incident, though triable at common law. But Lord *Coke* added, *if the ſpiritual court ſhould decide otherwiſe on ſuch award than it ought by common law*, that then a prohibition ſhould be granted; which was allowed by *Doddridge*. In Sir *William Juxon* v. Lord *Byron*, 2 *Lev.* 64., in a ſuit for tithes by mortgagor in poſſeſſion, the mortgagee came in *pro intereſſe ſuo*, and the eccleſiaſtical court decided againſt him; and prohibition was denied, becauſe they had done right. But *Hale* and the whole Court agreed, "that though the "ſpiritual court *may* try matters cognizable at the com-"mon law which fall in incidentally, where the prin-"cipal is eccleſiaſtical; yet they ſhall be prohibited if "they proceed in the trial of ſuch incident temporal "matter otherwiſe than the common law would." The authority of this caſe is recognized by Lord *Mansfield* in *Full* v. *Hutchins*. And in *Shotter* v. *Friend*, *Carth.* 142. where payment of a legacy was offered to be proved by *one* witneſs and diſallowed; after ſentence, prohibition was awarded on this ground, that where the ſpiritual court determine any incident temporal matter, they muſt do it according to the courſe of the common law; and if they do not, a prohibition will go: as if they require the revocation of a nuncupative will to be proved by *two* witneſſes; or hold that tithes are not well ſet out without notice to the parſon. All theſe, it is to be obſerved, are caſes of things within the juriſdiction of the ſpiritual court, and might be the ſubject of appeal. And authorities may be found equally ſtrong as to the courts of *Weſtminſter Hall* interfering by prohibition where ſtatutes have been expounded otherwiſe than the courts of common law would expound them. As to which I will firſt refer

to

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to the anſwers of all the Judges to the complaint exhibited by Archbiſhop *Bancroft* in the reign of *Jac.* 1., one of which was, "that the Judges, under colour of authority to interpret ſtatutes, in favour of their prohibitions, made cauſes eccleſiaſtical to be of temporal cognizance." To which the anſwer was; "As for the Judges expounding "of ſtatutes that concern the eccleſiaſtical government "or proceedings, it belongeth to the temporal Judges." 2 *Inſt.* 614. *Wheeler*'s caſe, in *Godbold*, 218, was a queſtion on a ſtatute within the juriſdiction of the eccleſiaſtical court; for the offence was by the ſtat. 5 *E.* 6. *c.* 3. *ſ.* 3. puniſhable in that court, and the truth and validity of the defence was a matter for them to determine, (ſs.), whether the carrying the hay was a work of neceſſity within the meaning of the 6th ſection of that act of Parliament; and if that Court decided improperly thereupon it was fit matter for an appeal: yet a prohibition was granted, "becauſe it was for the Judges to ſay whether a holiday created by act of Parliament were broken or not. Upon this caſe Mr. Juſtice *Buller*, in *Home* v. Lord *Camden*, has obſerved, that the Judges muſt have conſidered this as a caſe without the juriſdiction of the eccleſiaſtical court, as being excepted out of the act of Parliament. - But it ſeems rather that the ground of the determination was, that the eccleſiaſtical court held that to be a breach of the ſtatute, which the courts of common law would not have holden to be a breach: and as the offence was created by the ſtatute, they would prohibit in caſe it were miſconſtrued. Not that the ſpiritual court had not juriſdiction to conſtrue it, but that the miſchiefs of miſconſtruction were to be prevented by prohibition. In 2 *Roll. Abr.* 303. *pl.* 27. prohibition was granted to the delegates, to prevent their granting

granting adminiſtration to one nearer of blood by their law, but not ſo near by ours: and this reaſon was aſſigned for it; becauſe this being ordained by ſtatute ought to be interpreted according to our law; and, as the book ſays, prohibition was granted *to try the law.* Upon which Mr. Juſtice *Buller* has obſerved, that no prohibition can be granted for the purpoſe of *trying the law:* but this obſervation ſeems well anſwered at the bar; for the book can only be underſtood to mean and refer to that trial of the law which conſtantly takes place when the plaintiff is directed to declare in prohibition, in order that the law upon the matter in diſpute may be thoroughly diſcuſſed and ſettled. This caſe was in *Mich.* term, 21 *Jac.* 1.; and a ſimilar point was determined in another caſe, *Hil.* 22 *Jac.* 1. *ibid. pl.* 28. In the ſame book alſo, fol. 302. pl. 19. it appears that prohibition was granted to the ſpiritual court in a proceeding on the ſtat. 2 *E.* 6. *c.* 13. *ſ.* 2. for not ſetting out tithes; becauſe that Court held it not a ſufficient ſetting out, the parſon not being preſent; it being ſufficient by our law, although the parſon be abſent: which caſe was relied on in that of *Shotter* v. *Freind,* already mentioned. In *Berkley* v. *Morris, Hardreſs,* 502. in a proceeding in the Admiralty for an account of a merchant ſhip taken as prize, a plea of the ſtatute of limitations was refuſed; and the Court of Exchequer, *Hale* being the Chief Baron, held that the plea ought to have been received; for that the ſtatute was pleadable in the Admiralty; and if it were not received, that the rejecting it was a good cauſe of prohibition; *and likewiſe if they received it, and did not give ſentence thereupon as the common law requires.* In *Carter* v. *Crawley, Sir T. Ray.* 496. the queſtion was, if the repreſentatives of a deceaſed aunt of an inteſtate were entitled

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to a ſhare of his perſonal eſtate under the ſtatute of diſtributions, jointly with a living aunt of the inteſtate? And there (p. 497.) Lord *North* ſaid, "whatever is determined at common law to be the true meaning of that act muſt be a rule to the eccleſiaſtical courts; for the courts of common law are entruſted with the expoſition of acts of parliament, and we ought not to ſuffer them to proceed in any other manner than ſhall be adjudged by the King's courts to be the true meaning of the act." And though there were, according to *Freeman's Report*, 297. a difference of opinion, yet that was as to the conſtruction of the ſtatute of diſtributions, and not as to the abovementioned poſition of Lord *North*, for the purpoſe of which this caſe is now cited. And in the caſe of *Pearſe* v. *Hubbard*, *Strange*, 249. it was a matter for the Admiralty Court of *Cinque Ports* to determine, whether the party under the true conſtruction of the act of parliament, 3 *Geo.* 1. were liable to the penalty for navigating a ſhip, not being a member of the *Trinity Houſe*: it was the proper forum ſpecially appointed by the ſtatute to try and decide on the offence, if the offender were found within the juriſdiction of the ſame; and if they gave an erroneous judgment, it might be corrected on appeal: yet the Court interpoſed by prohibition: and Lord C. J. *Pratt* there conſiders not only a want of juriſdiction as a ground of prohibition, but alſo the circumſtance of a Court proceeding by the rules of the civil law deciding otherwiſe than the courts of common law would upon the ſame ſubject. For he ſays, "admitting the caſe to be within the intent of the act, "yet ſurely in the caſe of a freehold we ought to be ſa- "tisfied of that removal, i. e. of the juſtice of that re- "moval, by their ſhewing a power to make by-laws "and every other ſtep neceſſary to make a lawful re-

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"moval; and for want of *this* as well as for want of "*juriſdiction*, I think no conſultation ſhould go." The ſubject matter of all theſe caſes, both as they involved the determination of queſtions of a temporal nature, and the conſtruction of ſtatutes, was clearly within the juriſdiction of the ſeveral courts prohibited. They are caſes in which the judgment given below might have been corrected on appeal: and ſome of them are caſes where the common law courts have taken upon themſelves the conſtruction of acts of parliament made reſpecting ſubjects peculiarly relating to the inferior courts ſo prohibited, and have yet even in ſuch caſes granted prohibitions when ſuch inferior courts miſconſtrued thoſe acts of parliament. And the diſtinctions attempted in the argument for the defendant fail in ſhewing that the queſtion now under conſideration does not fall within the authority of thoſe determinations in which prohibitions have been granted; for the caſes cited ſhew that prohibitions have been granted in queſtions within the juriſdiction of ſuch inferior courts, not merely where the rules of the two juriſdictions neceſſarily claſh with each other, or in caſes of conſtruction of *ſtatutes* regulating their juriſdictions; but that the courts of common law have *in all caſes*, in which matter of a temporal nature has incidentally ariſen, granted prohibitions to courts acting by the rules of the civil law, where ſuch courts have decided on ſuch temporal matters in a manner different from that in which the courts of common law would decide upon the ſame: and that this has been the doctrine of the Judges, not only in the time of Lord *Coke*, when a conſiderable degree of jealouſy ſubſiſted between the courts of *Weſtminſter-hall* and thoſe of eccleſiaſtical juriſdiction, but in the times of Lord *Hale*, Lord *Holt*, Lord C. J. *Pratt*, and as lately as in the time of Lord

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Mansfield, who in the case of *Full* v. *Hutchins* particularly instanced the misconstruction of an act of parliament as a ground for prohibition, even *after* sentence; the reasons of which are so strongly marked by Sir *Wm. Blackstone* in the passage already cited from his Commentaries. And to use by adaptation to this subject a part of the words of Lord C. J. *Vaughan,* in *Hill* v. *Good, p.* 304., and whose authority has been quoted to shew that the common law has encroached on matters spiritual, it may be said, "though if the granting prohibitions to the spiritual "courts were *res integra* now, we might not see reason to "grant them in any case, the matter being wholly of ec- "clesiastical conuzance;" yet as "many prohibitions "have been granted to the spiritual courts in cases upon "the construction of different statutes, and after so many "parliaments wherein no complaint has been made, or "certainly no redress given, it cannot be expected we "should against so many judicial precedents take upon "us to alter the law so long practised." For these reasons we are of opinion that the prohibition should stand.

Friday, June 15th.

The KING *against* CORRY.

The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *G.* 1. *c.* 4 *s.* 6. unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose.

THIS indictment framed on the stat. 11 *Geo.* 1. *c.* 4. *s.* 6. against the defendant, as bailiff of the borough of *Ivelchester,* for absenting himself from a corporate meeting for the election of a new bailiff for that borough, stated that *Ivelchester* in the county of *Somerset* is an ancient borough, and incorporated by charter of the 3d and 4th of *Philip* and *Mary,* by the name of the bailiff and

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burgeſſes of the borough of *Ivelcheſter*, which directs that there ſhould be one bailiff to be choſen of the burgeſſes in form thereinafter ſpecified. That the charter named *John Philips Burgeſs*, an inhabitant of the borough, to be the firſt bailiff, to continue in office till the feaſt of *St. Michael the Archangel*, and until another inhabitant or burgeſs ſhould be made ruler and ſworn to that office according to the ordinances, &c. after ſpecified. And granted further, that there ſhould be twelve burgeſſes to be called the chief burgeſſes and counſellors of the ſame town for all matters touching the government of the ſame: and that they the chief twelve burgeſſes ſhould be from time to time aiding and aſſiſting the bailiff for the time being in all matters touching the ſaid borough. *That the ſaid capital burgeſſes and counſellors* of the borough *for the time being, or the greater part of them*, from time to time ſhould have power *yearly and every year* in *September*, viz. on the *Monday* next before the *feaſt of* St. Michael the Archangel, *to chuſe and nominate one of themſelves who ſhould be bailiff of the borough* for one whole year then next enſuing; and that he after his election and before his admiſſion ſhould take the oath of office on the *Monday* then next following his election as aforeſaid, *before the bailiff being his laſt predeceſſor, if he ſhould be alive and preſent*, in the preſence of the other chief burgeſſes for the time being; and *if the ſaid bailiff his predeceſſor ſhould be then dead or abſent*, then before the chief burgeſſes for the time being, or the greater part of them. The indictment then ſtated, that the defendant, late of the pariſh of *Ivelcheſter* in the borough of *Ivelcheſter* aforeſaid, in ſaid county of *Somerſet*, on the 25th of *September*, the 43 *Geo.* 3. was and from thence until and upon the *Monday* next before the feaſt of *St. Michael the Archangel*,

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in the 43d year aforeſaid, and afterwards *was bailiff of the ſaid borough*; and that on *Monday* next before the feaſt of *St. Michael the Archangel*, in the 43d year aforeſaid, certain of the then capital burgeſſes of the borough aſſembled together at the *Guildhall* of and within the ſaid borough, the ſame being the uſual and proper place for that purpoſe, *in order to chuſe one of themſelves to be bailiff* for the enſuing year; and *it was then and there the duty of the defendant as ſuch bailiff as aforeſaid to attend and be preſent at ſuch election*; nevertheleſs the defendant not regarding his duty in that behalf, nor the ſtatute, &c. upon the ſaid *Monday* next before the feaſt of *St. Michael the Archangel*, in the 43d year aforeſaid, the ſame ſo being the charter-day for ſuch election as aforeſaid, *unlawfully and voluntarily did abſent himſelf from the ſaid aſſembly ſo holden for the purpoſe of ſuch election of a bailiff of the borough, and from ſuch or any other election of the ſaid officer*, contrary to the form of the ſtatute, &c. in contempt, &c.

After verdict it was moved in arreſt of judgment, 1ſt, that the ſtat. 11 *Geo.* 1. *c.* 4. on which the indictment was framed extends only to ſuch chief officers of boroughs whoſe preſence is neceſſary to an election, and that it does not appear from the conſtitution of this borough, as ſet forth in the indictment, that the preſence of the defendant as bailiff and chief officer of the corporation was neceſſary to the holding of a corporate aſſembly for the election of his ſucceſſor. 2dly, That there is no venue laid to the offence charged.

Gibbs, *Lens* Serjt., *Dampier*, and *Pell*, ſhewed cauſe againſt the rule. 1ſt, The law creates a duty in all the members of a corporation to attend corporate meetings, and

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and more particularly in the chief officer, whoſe duty it is to preſide. And therefore it was ſaid in *Reg.* v. *the Bailiffs of Ipſwich* (*a*), that nothing could be done at a corporate aſſembly without the preſence of the bailiffs, being the heads of the corporation; and that, though no ſpecial proviſion were made for it in that charter; for that the quorum clauſe was no more than the law would imply (*b*). Then the ſtatute 11 *G.* 2. is only confirmatory of the general law, and aſſumes, rather than creates the neceſſity of the chief officer's attendance, though only for the purpoſe of preſiding at a corporate meeting for the election of his ſucceſſor; for without him the corporation cannot be ſaid to be complete, and conſequently no corporate act can be done. With this view the 6th clauſe is framed in the disjunctive, "that if any mayor, "bailiff, or other chief officer ſhall *voluntarily abſent* him-"ſelf, *or* knowingly and deſignedly prevent or hinder the "election of any other chief officer, &c. he ſhall ſuffer "ſix months' impriſonment," &c. The object of the ſtatute was to inſure the annual election of the chief officer of every corporation, which it was in the power of the then chief officer to fruſtrate or delay, either by wholly abſenting himſelf on the charter or preſcriptive day of election, by which no corporate aſſembly could be holden; or if preſent in the firſt inſtance, by irregular conduct in the mode of election, or by diſſolving the aſſembly before the buſineſs was concluded. Therefore his voluntary abſence was made a ſubſtantive offence as well as his deſignedly hindering the election, which latter might be committed by him when preſent: and the former may be committed, though he were not included in

(*a*) 2 *Ld. Ray.* 1237. (*b*) Sed vide 3 *Mod.* 13.

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the quorum clauſe of election. The proviſion in the charter for the new bailiff's taking the oath of office before the chief burgeſſes in the abſence of the laſt bailiff was not intended to diſpenſe with his attendance, but to provide a ſubſtitute for it, and render the election valid, notwithſtanding ſuch his abſence, which would otherwiſe have been invalid. The ſwearing in is alſo on a day ſubſequent to the election, and therefore no inference can be drawn from that proviſion to ſhew that his preſence might be diſpenſed with at the election. And though the election clauſe does not mention the bailiff by name; yet being always a *capital burgeſs*, he was conſidered as ſufficiently deſignated under that general deſcription, in which character he would have voted. But the neceſſity of his attendance as chief officer is for the purpoſe of *preſiding*, which duty in his abſence muſt be performed by another. And here it being expreſsly alleged that it was his duty to have attended, if it were not ſo, he ought to have ſhewn it at the trial as matter of defence. *Dormer's* caſe, 2 *Leon.* 5. 2dly, As to the want of venue, abſence is a negative act, and therefore needs no venue; as in an indictment on the ſtat. 1 *Eliz.* *c.* 2. for abſenting from church. 1 *Hawk.* *c.* 10. *ſ.* 5. But if a venue were neceſſary in this caſe, it is ſufficiently laid; for the place is mentioned where the election ought to have been made, namely, "*at the* Guildhall *of and within the ſaid borough*;" and it is alleged that it was then and *there* the defendant's duty to have attended and been preſent, and that he abſented himſelf therefrom.

Burrough in ſupport of the rule. 1ſt, The corporation is alleged to conſiſt of a bailiff and twelve capital burgeſſes, which latter are to be *aiding and aſſiſting* to the bailiff.

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bailiff. Therefore where the charter afterwards directs the election of the bailiff to be made by "the ſaid capital burgeſſes *and counſellors*," that muſt mean excluſive of the bailiff for the time being; though if it were otherwiſe, his interference in the election would only be in his character of capital burgeſs, and not as bailiff, and ſo not within the ſtatute. The object of the ſtatute was not to enforce the attendance of chief officers of corporations where it was not before required, and where it would be nugatory, but as the act itſelf expreſſes it, "to prevent the inconveniences ariſing from want of ſuch elections being made upon the days appointed;" which inconveniences aroſe "by *the contrivance or default of the perſon who ought to hold the court or preſide* in the aſſembly where ſuch elections were to be made:" for remedy whereof it enacts, "that if in any borough, &c. no election ſhall be made of the chief officer upon the day appointed by charter or uſage, or ſuch election being made ſhall afterwards become void, whether ſuch omiſſion or avoidance ſhall happen *through the default of the officer who ought to hold the court or preſide*, &c. or by any accident, the corporation ſhall not be diſſolved or diſabled from electing ſuch officer for the future." And then it goes on to provide that on a future day "*the members or perſons having right to vote at or to do any other act neceſſary to be done in order to ſuch election*" ſhall forthwith proceed to the election. The whole purview of the act ſhews that the 6th clauſe which puniſhes the chief officer voluntarily abſenting himſelf, or deſignedly hindering the election on the charter or uſage day, was only intended to apply to ſuch chief officers whoſe abſence or hindrance could fruſtrate the election, to whom only the miſchief to be remedied and the nature of the remedy could apply.

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apply. And it was neceſſary that the clauſe ſhould be framed in the disjunctive, becauſe the miſchief might ariſe as well from the abſence of ſuch an officer as from his miſconduct when preſent. Then the allegation that it was the defendant's duty *as bailiff* to attend the election is a mere inference of law not warranted by the premiſes. 2dly, As to the want of venue; this is not ſuch a negative act to which no certain place can be aſſigned; for the defendant's attendance, if neceſſary, was a local duty, and his abſence from the proper place in order to bring him within the words of the act, muſt have been *voluntary*, and is ſo alleged to have been. The offence then was not only capable of having a venue aſſigned, but could not properly be deſcribed without one. Then it is not ſufficient that a place be named in an indictment unleſs it be named by way of venue; whereas the only mention of the borough of *Ivelcheſter* is either as an addition to the defendant or as deſcriptive of the place where the *Guildhall* was, which in itſelf is no venue.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. delivered judgment.

This is an indictment againſt the defendant as bailiff of *Ivelcheſter*, charging him with having, in breach of his duty, *unlawfully and voluntarily abſented himſelf* from an aſſembly or meeting of the twelve capital burgeſſes of that borough, holden on *Monday* next before the feaſt of *St. Michael* laſt paſt at the *Guildhall* of and within that borough, purſuant to the charter of *Philip* and *Mary*, for the election of a bailiff on that day, *againſt the form of the ſtatute*, *i. e.* of the 11 *G.* 1. *c.* 4. *ſ.* 6. Upon a motion in arreſt of judgment two objections have been taken to the

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the indictment; 1ſt, That it does not appear to have been *the neceſſary duty of the defendant* (who is admitted to have been in virtue of his office of bailiff, *chief officer* of the borough), to have been *preſent at the meeting of the capital burgeſſes* holden *for the election of his ſucceſſor*. 2dly, That there is no *venue* laid in the indictment, from which a jury may come for the trial of the ſeveral facts alleged in the indictment, and upon which iſſue is joined upon the plea of not guilty. As to the firſt of theſe objections; it does not appear *by the charter* ſtated to have been the duty of the defendant, *as bailiff*, to be preſent at the election of his ſucceſſor. It is an election which the charter only requires to be made by the *capital burgeſſes*, who are twelve in number, or the greater part of them, without making any mention whatever of *the bailiff* with a reference to that election. And though the bailiff when elected be directed to be ſworn upon the *Monday* following before *his predeceſſor*, "if *he ſhould be alive* and *preſent*," yet ſo little is the preſence of the bailiff eſſentially neceſſary even on that occaſion, that the charter directs that "if the bailiff the predeceſſor *ſhould be then dead or abſent*," the new bailiff ſhould be ſworn in "*before the chief burgeſſes of the borough for the time being or the major part of them.*" The preſence of the *bailiff*, *as ſuch*, not being (as it clearly is not) required by the letter of the charter, it remains to be conſidered whether it be required either by the common law, or by the ſtat. of the 11 *G.* 1. *c.* 4. That it is required by the general rule of the common law, independent of any charter of the particular borough, was contended on the part of the proſecutor on the authority of the *Queen againſt the Bailiffs of Ipſwich*, 2*d Lord Raymond* 1237; where it is laid down by the Court, "that as in all *corporate acts* the act of the majority

11 *Geo.* 1. *c.* 4.

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"majority is the act of the whole, so the *bailiffs being the* "*head of the corporation*, nothing can be done *without* "*their presence*; and this is so though no special pro- "vision be made for it by the charter:" But this must be understood of general corporate acts required to be done by the *whole* body corporately assembled, and which of course are not well done, if the chief officer, being an integral part of such body, be wanting. But this rule does not apply to cases where acts are required or authorized to be done, as here, by any one integral member or branch of the corporation, acting separately and apart from the rest. Is it then (which is the only remaining question upon this first head of objection) required by the stat. 11 *G.* 1. *c.* 4.? By adverting to the preamble it appears that the *mischief meant to be obviated* was the mischief arising from the not doing acts required by charter or usage to be done at *certain times in order to or for the completing of the election of mayor, bailiffs, or other chief officers*. And by the 6th section of the act it is for that purpose enacted, "that if any mayor, bailiff, or "bailiffs, or other chief officer or officers of any city, "borough, or town corporate shall *voluntarily absent him-* "*self or themselves from, or knowingly and designedly prevent* "*or hinder the election of any other mayor, bailiff, or other* "*chief officer* of the same city, borough, or town cor- "porate, upon the day or within the time appointed by "charter or ancient usage for such election," the person so offending is, upon conviction, to suffer *six months' imprisonment*, and to be disabled from *holding any office* belonging to that corporation. The *voluntary absence* from *the election of a chief officer*, which is thus severely punished by six months' imprisonment and the corporate incapacity above stated, must, in fair construction of the

statute,

ſtatute, be ſuch an abſence whereby the miſchief complained of in the preamble, viz. "of preventing the completion of the election of a chief officer," and for the remedy and prevention whereof the act is profeſſedly made, may poſſibly be occaſioned. It muſt be abſence, at leaſt, where preſence was antecedently a duty: But that cannot be predicated of the abſence on this occaſion, with a reference to any of the duties of the *bailiff, as ſuch*, which are either enjoined by this charter, or to be collected from any principles of the common law. Unleſs therefore this 6th ſection can be conſidered as of itſelf creating a ſubſtantive neceſſity in all caſes for the preſence of the chief officer of the corporation, *as ſuch*, at the election of his ſucceſſor, where his preſence was not required before the ſtatute (which appears to us a propoſition not capable of being maintained); the *voluntary abſence* charged in this indictment of a chief officer who had no occaſion, *as ſuch*, to be preſent, and whoſe abſence had no effect whatſoever towards preventing or hindering the election of his ſucceſſor, is not that *voluntary abſence* of a *chief officer* which this act meant to remedy or prevent by the penal proviſions of the 6th ſection. As the indictment appears to us therefore to be bad upon this firſt ground of objection, it renders it unneceſſary to enter into the validity of the ſecond objection, on the ground of which the judgment is ſought to be arreſted.

Judgment arreſted.

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Saturday, June 16th.

The KING *againſt* The Inhabitants of PUCKLECHURCH.

Where nothing is ſaid in a contract of hiring about time but a reſervation of *weekly* wages, it is a *weekly* hiring only. Therefore where the contract was for the ſervant *to live* with his maſter, the latter finding him board and lodging, and *paying* him 2*s*. 6*d*. per week, no ſettlement could be gained by ſervice for more than a year under ſuch contract.

TWO juſtices removed *Thomas Pritchard*, his wife, and daughter, by name, from the pariſh of *Pucklechurch* to the pariſh of *Weſterleigh*, both in the county of *Glouceſter*. The Seſſions, on appeal, quaſhed the order, ſubject to the opinion of this Court on the following caſe. The pauper *T. Pritchard* being ſettled in *Weſterleigh* about ten years ago hired himſelf to *T. King* of *Pucklechurch* for eight weeks ending at *Midſummer*, at 5*s*. per week: at which time he hired himſelf again to the ſame maſter, at 4*s*. per week till the *Michaelmas* following. At *Michaelmas* he entered into a new agreement with his maſter to live, the maſter finding him board and lodging, and paying him 2*s*. 6*d*. per week: but no time was fixed or talked of by the maſter or ſervant for the duration of the contract. When the ſummer ſeaſon arrived the pauper ſaid to his maſter, "I muſt have more now I believe, maſter:" The maſter ſaid, "How much more?" and his wages were increaſed. And ſo as the winter or ſummer ſucceeded his wages were accordingly reduced or increaſed. At the time when the alteration of wages took place there was no converſation as to leaving the ſervice or diſſolving the contract. The alterations of wages took place at the beginning of the week. He entered and left his ſervice on the ſame day of the week, being *Sunday*. There was a general ſettlement at the time he left the ſervice with reſpect to wages,

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and ſome diſpute; but he could not remember what it was. The pauper was more than once abſent from his maſter's ſervice two or three days at a time to ſee his friends with his maſter's conſent. He ſerved in the whole five years and a quarter, and received money on account of wages at different times, ſometimes a guinea and ſometimes more; but there was no complete ſettlement of wages till he and his maſter parted. But at the time he was not paid ſo much as he thought he was entitled to; but whether on account of abſence or not he did not know.

Abbott and *Hall*, in ſupport of the orders of ſeſſions, relied on the laſt agreement of the ſervant *to live* with his maſter, without any limitation of time; which the law therefore deemed to be a hiring for a year; and which was not varied by the circumſtance that the wages were to be *paid* weekly; as in *R.* v. *Seton and Beer* (*a*), and *R.* v. *Hampreſton* (*b*). And they argued that this was different from the caſes of *R.* v. *Bradnunch* (*c*), where the contract of hiring was by the week, and *R.* v. *Clare* (*d*), where it was by the month; and from *R.* v. *Newton Toney* (*e*), and *R.* v. *Hanbury* (*f*), where the hiring was *at ſo much a week*, which was conſidered as the ſame thing; and, in the latter caſe, either party might part at a week's notice. That admitting the intention of the parties as to the generality or duration of the hiring to be ambiguous, the fact of the pauper's having continued in the ſervice above a year was a circumſtance which might be taken to explain the original intent; as in *R.* v.

(*a*) 2 *Conſt.* 200. (*b*) 5 *Term R p.* 205. (*c*) *Burr.* S C. 662.
(*d*) *Ib.* 819. (*e*) 2 *Term Rep.* 453. (*f*) 2 *Eaſt*, 423.

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Longwhatton (*a*), where ſervice for above a year as a domeſtic ſervant, there being no evidence of the contract, was deemed ſufficient to raiſe a preſumption of a general hiring. And here the maſter agreed to find board and lodging for the pauper as a domeſtic ſervant. Then the mere alteration of wages in the middle of the year, the ſervice continuing the ſame, will not prevent the gaining of a ſettlement; as in *R.* v. *Alton* (*b*).

Gibbs and *Taunton* contrà were ſtopped by the Court.

Lord ELLENBOROUGH C. J. If nothing be ſaid as to the term of the ſervice but that the ſervant ſhall have weekly pay, it muſt primâ facie be underſtood that the parties intended a weekly hiring and ſervice. But circumſtances may ſhew a different intent. Then are there ſuch circumſtances in this caſe, from which we can fairly collect that the parties intended a hiring for a year? In the firſt inſtance the hiring was for a ſpecific term of eight weeks; the ſecond hiring was alſo for a definite time ſhort of a year. No time was mentioned at the third hiring, but it was a hiring at *weekly* wages. Then it falls within the caſes of *Dedham*, of *Bradninch*, of *Newton Toney*, and others of the ſame claſs; where a hiring at weekly wages has been holden to be a weekly hiring. And if it wanted any additional circumſtance the conduct of the parties themſelves afterwards ſhews that they ſo conſidered it; for the ſervant left his maſter at the end of the week in the middle of a year. If an indefinite hiring were ſtated on a record, and nothing ſhewn to control it, it will be deemed a hiring for a year: but

(*a*) 5 *Term Rep.* 447. (*b*) *E.* 24 *Geo.* 3. 2 *Conſt.* 382;

that

that is in the abſence of any circumſtance from whence a different intent is to be collected: and here weekly wages being reſerved, and nothing elſe added to ſhew an intention to extend the contract further, will induce the concluſion in law of a weekly hiring and ſervice intended by the parties. There is a current of authorities to this point.

GROSE J. A reſervation of weekly wages will make a weekly hiring, if nothing appear to the contrary. And here the circumſtances do not furniſh any other inference. In the firſt and ſecond hirings certain definite times were mentioned, where it was meant to extend the contract beyond a weekly hiring: but at the third hiring there was nothing ſaid, from whence the intended duration of it was to be collected, but the reſervation of weekly wages. It appears alſo that the wages varied from time to time at the different ſeaſons of the year. That cannot furniſh the inference of an implied hiring for a year; for then the wages muſt have continued the ſame as they were at firſt ſettled. The third hiring, therefore, was not a general hiring, but a hiring from week to week.

LAWRENCE J. I thought the law had been perfectly ſettled ſince the caſe of *Newton Toney*; for the rule was there laid down, that if there were any thing in the contract of hiring to ſhew that it was intended to be for a year, the reſervation of weekly wages would not control it: but if the payment of weekly wages were the only circumſtance from which the duration of the contract was to be collected, it muſt be taken to be only a weekly hiring. Then what is this but a weekly hiring by that rule? The point having been before preciſely

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determined, this case ought not to have been brought up.

LE BLANC J. Neither the first nor the second hiring can be pretended to give a settlement. Then as to the third, it is clearly a hiring for weekly wages, and there is nothing to denote that it was for a year except that no time was mentioned, from whence it is contended that in contemplation of law it must be taken to be yearly hiring. But it has been holden that a reservation of weekly wages, without more, is only a weekly hiring. But if there were any doubt of that, there is another circumstance confirmatory of that construction; for the servant in the middle of the year required an advance of wages, which the Master acceded to without any question; a circumstance which was scarcely probable to have happened if the parties had considered that they had contracted for a year. These circumstances therefore rebut any implication of law, that this was a yearly hiring.

Lord ELLENBOROUGH C. J. then added, that he hoped it would be understood in future, that where nothing was said in the contract about time, but a reservation of weekly wages, it was only a weekly hiring.

Order of Sessions quashed.

Monday, June 18th.

Where a writ of fi. fa expires in the vacation, the sheriff need not return it till the first day of the ensuing Term, and has the whole of that day to file it.

The KING *against* The Sheriff of BERKS.

THE Sheriff was ruled on *Saturday* the 12th of *May* last, two days before the end of *Easter* term, to return a writ of *fieri facias*; but no return was made till

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the firſt day of this term; on which day an attachment was obtained againſt him for not returning it. *Gibbs* thereupon moved to ſet aſide the attachment, on the ground that the rule having expired in the *vacation*, the ſheriff had until the firſt day of this term to return it, and was not bound to make his return within the ſix days given him by the rule. *Garrow* and *T. Carr* relied on the rule of Court, *Mich.* 32 *Geo.* 3. (*a*), to ſhew that the ſheriff ought to have returned the writ within the ſix days; which rule directs that all writs ſhall be returned by the ſheriff on the day on which the rule for returning the ſame expires.

The Court however, on inſpection of the rule, were of opinion that it could only apply to writs returnable in term; becauſe it ſays, at the concluſion of it, that "in "default thereof the plaintiff ſhall be at liberty to move "for an attachment *on the next day*," which can only be moved in term time.

The Maſter afterwards put into the hands of the Court an anonymous caſe in *Tr.* 30 *Geo.* 3. taken by the late Maſter *Benton*, which was read as follows:

"Where a rule to return a writ is ſerved only three days before the end of a term, the ſheriff has until the firſt day of the next term and all that day to file the return."

Per Curiam, Rule abſolute for ſetting aſide the attachment (*b*).

(*a*) 4 *Term Rep.* 496.

(*b*) Upon inquiry it appears that many ſuch writs are filed in vacation with the Cuſtos Brevium. But the ſheriff of London and Middleſex in particular ſeldom returns them until the firſt day of the following Term.

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Thompſon and *Anderſon* of the ſecond part, and the ſeveral underwriters of the third part; which after reciting (in ſubſtance) that *Thompſon* and *Anderſon*, and the ſaid other perſons parties thereto of the third part, had inſured the ſhip *Thomas* upon her ſaid voyage, at and from *Riga* to her port of diſcharge in *England*; that the ſhip had been and then was detained under the ſaid embargo at *Riga*; and that the plaintiffs being ſole owners of the *Thomas* had given, according to the law and uſage of merchants, due notice of abandonment thereof, and had called upon the ſeveral underwriters for the amount of their reſpective ſubſcriptions, which they had reſpectively agreed to pay on having the ſhip aſſigned to *Thompſon* and *Anderſon* upon the truſts thereinafter mentioned; purported to be an aſſignment or transfer by the plaintiffs of the ſhip *Thomas*, and all the intereſt, property, claim, and demand of the plaintiffs of, in, to, or out of the ſaid ſhip and her appurtenances to *Thompſon* and *Anderſon*, upon the truſts therein mentioned. The ſaid indenture was executed by the plaintiff *M'Carthy*, (but not by the other plaintiffs,) by *Thompſon* and *Anderſon*, and by the ſeveral other perſons parties thereto of the third part. In *July* 1801 *R. Corner*, one of the plaintiffs, as maſter of the ſhip, drew a bill at *Riga* for 718*l.* 3*s.* 6*d.* upon Mr. *Halliday* the agent of the underwriters on the ſhip, for the purpoſe of paying for maſts, ſails, cables, repairs, and other charges on the body of the ſhip: This bill was duly paid by Mr. *Halliday* in *London*. And on the 30th of *September* 1801 Captain *Corner*, as maſter of the ſhip, received at *Plymouth* of the agents of the freighters 500*l.*, part of the freight, to enable him to pay ſeamen's wages and the charges of delivering the cargo; and the laſt-mentioned ſum of money was duly applied to thoſe purpoſes. The under-

writers

writers upon the ſhip claimed the freight, and the ſum of 1742*l.* 6*s.* 10*d.* the balance of ſuch freight, after deducting the 500*l.* has been paid by the freighters of the ſhip to the agent for the underwriters, under an indemnity from them againſt any claims which might be made thereto either by the plaintiffs or by the underwriters on the freight. The agent for the underwriters on ſhip gave a receipt, dated the 7th of *December* 1801, for the ſaid 1742*l.* 6*s.* 10*d.* as for freight of the ſaid cargo. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If they were, the verdict to ſtand; otherwiſe a nonſuit to be entered.

This caſe was firſt argued in *Hilary* term laſt by *Hallock* for the plaintiffs and *Giles* for the defendant, and again in this term by *Park* for the plaintiffs and *Erſkine* for the defendant. The Court having directed the ſecond argument to be confined to the conſideration of the effect of an abandonment of a ſhip upon the right to the accruing freight, it is ſufficient to ſtate the ſubſtance of the arguments on that point, which was recently under conderation in the caſe of *Thompſon* v. *Rowcroft* (*a*).

For the plaintiffs it was argued, that the law of *England*, recognizing ſhip and freight as two diſtinct objects of inſurance, conſequently recognizes them as diſtinct ſubjects of abandonment; and therefore as a ſimple inſurance of *ſhip*, without more, does not cover *freight*, ſo an abandonment of the former muſt be always underſtood with an implied reſervation of the latter, otherwiſe the underwriter on ſhip would gain that for which he had confeſſedly paid no equivalent. The laws of *France*

(*a*) 4 *Eaſt*, 34.

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and ſome other countries differ from our own in this reſpect, conſidering freight as a mere acceſſary of and inſeparably attached to the ſhip. 2 *Valin.* 58. *Pothier, c.* 1. *ſ.* 2. *par.* 36. 2 *Emerigon*, 221. The freight there being reckoned as part of the value of the ſhip, the underwriter on ſhip is in truth an underwriter on freight alſo. In this caſe, whether the act of the *Ruſſian* government amounted to an embargo or an hoſtile ſeizure (*a*), it was ſufficient at the time to warrant the plaintiffs in abandoning both ſhip and freight to the reſpective underwriters: and if the action had been brought for a total loſs immediately after ſuch abandonment there could have been no defence to it. The circumſtance then of the freight having been ſince earned and received cannot, as between theſe parties, deſtroy the right of action which then accrued. At moſt it is only ſo much ſalvage for the benefit of the underwriters on freight which they are entitled to recover from the freighters. Inſurance is always conſidered as a contract of indemnity (*b*). The underwriter on ſhip engages to indemnify the owner againſt the loſs of the body of the ſhip by certain perils, he taking the benefit of ſalvage of the materials remaining, if any. The underwriter on freight engages to indemnify him from any loſs of the expected profits of the ſhip derived from the carriage of goods, &c. for the particular voyage, he alſo taking the benefit of ſalvage of freight, if any be earned after an abandonment; though from the nature of the contract ſalvage of this ſort ſeldom accrues, where the ſhip itſelf or the voyage is ſo far endangered as to warrant an abandonment. The aban-

(*a*) In *Beale* v. *Thompſon*, 4 *Eaſt*, 546. it was conſidered in the nature of an embargo, and not of a capture.

(*b*) *Goſs* v. *Withers*, 2 *Burr.* 698, and *Hamilton* v. *Mendez*, ib. 1210.

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donment then to either underwriter can only be co-extenſive with the intereſt which he inſured: and the inſurer of ſhip, knowing that he did not protect the freight, muſt be taken to have accepted the abandonment with an implied reſervation of the right of the owner to freight, if earned in the voyage inſured. He takes the ſhip ſubject to all the exiſting contracts which bound the owner in reſpect of it at the time of the abandonment. And it was decided in *Beale* v. *Thompſon* (*a*) that the hoſtile embargo in *Ruſſia* did not put an end to the prior contracts made for that voyage. Then the inſurer cannot be in a better ſituation after an abandonment than the inſured from whom he derives title, who before he abandoned had contracted with the underwriter on freight in a manner to ſecure to him eventually the benefit of ſalvage by the marine law. [*Le Blanc* J. Is it then contended that the contract of inſurance runs with the ſhip? Lord *Ellenborough* C. J. Was it ever heard of that a contract ſhould run with a chattel? Put the caſe of a man purchaſing a waggon as it is going on the road laden with goods, he is not bound to carry the goods to their journey's end, though the carrier, the vendor, who contracted ſo to do, will be liable on his contract.] The obligation in this caſe ariſes from the anomalous nature of the contract, and the permitting of two diſtinct ſubjects of inſurance in reſpect of the ſame ſubject matter, on which the ſeveral rights of abandonment and ſalvage are conſequential. The underwriter on ſhip, if ſtanding at all in the ſituation of a purchaſer, is at leaſt a purchaſer with notice; but in truth he only purchaſes a right of ſalvage after an abandonment of the ſubject matter of his inſurance; as the underwriter on freight is the purchaſer

(*a*) 4 *Eaſt*, 546.

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of a right of ſalvage of the freight abandoned to him. The abandonment of the ſhip only confers on the inſurer of it a qualified ownerſhip during the voyage inſured, an ownerſhip ſub modo according to the marine law, which recognizes the ſeparate intereſts of the owner in ſhip and freight, and the conſequent ſeparate intereſts of the underwriters on each, in caſe of an abandonment. The caſes of *Thompſon* v. *Rowcroft* (*a*), and *Leatham* v. *Terry* (*b*), went upon the particular terms of the contract of abandonment, and not on the general queſtion.

For the defendant it was inſiſted, that an abandonment to the underwriter on ſhip veſts in him the complete property of it with all its conſequences. The immediate ſubject of the policy is the body or ſubſtance of the ſhip which he inſures againſt actual loſs or deterioration by certain perils; but the inſurance being upon a certain voyage, and the indemnity having been extended to another ſort of loſs, namely of the *voyage* inſured, in which caſe, though the ſubſtance of the ſhip be ſafe, the owner has a right to abandon, it muſt be followed up with all its conſequences, one of which is the benefit of ſalvage, by which all the intereſt in and title to the ſhip is from the moment of the abandonment accepted transferred to the underwriter, he paying to the owner the full value at which the property was inſured. The underwriter on ſhip is not bound to take cognizance of any contract for freight or for inſurance of it, to which he is no party. For it would be abſurd to ſay that after he had purchaſed the whole property aſſigned to him for its full value he could not do what he pleaſed with his own. If the owner ſtood his own inſurer of the freight there could

(*a*) 4 *Eaſt*, 34. (*b*) 3 *Bos. & Pul.* 479.

be

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be no doubt but that a general abandonment of the ſhip, without ſpecially reſerving the freight, would convey all his intereſt to the underwriter; and the latter would not be bound to accept a qualified abandonment. But even if ſuch underwriter had notice of the exiſting contracts of affreightment and inſurance, it could not alter his ſituation; for the right to accruing freight being in reſpect of the property in the ſhip and the carriage of the goods to their ultimate place of deſtination, it muſt follow ſuch property prior to and till the arrival of the goods. It is with good reaſon therefore that the laws of *France* and other countries conſider freight as ſo inſeparable in its very nature from the property in the ſhip, that they do not admit them to be ſeparately inſured, and this caſe ſhews the inconſiſtency of the contrary practice. But ſtill no collateral contract of the owner with the inſurer on freight can abridge the right of property transferred to the underwriter on ſhip by the abandonment of it to him: and the owner, who has by his own act in making ſuch abandonment diveſted himſelf of the title to freight, and put it out of the power of the inſurer on freight to avail himſelf of the benefit of ſalvage reſerved to him in the event by his contract, can have no right to recover upon the freight policy under pretence of an abandonment, without benefit of ſalvage. From the moment of the abandonment accepted by the underwriter on ſhip all the expences of repair and riſk of the ſhip are transferred to him, and therefore he muſt in juſtice be entitled to derive all the benefit of it; for the benefit of ſalvage would be merely nominal if, notwithſtanding an abandonment to him and his paying the full value of the ſhip as for a total loſs, he were ſtill obliged to purſue the voyage inſured at his own riſk and expence for the benefit of the

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inſured. The benefit of ſalvage means every thing which remains of the ſhip at the time of the abandonment, without further claim of the inſured. It is ſufficiently hard upon the underwriter on ſhip to be compelled to pay the whole value of the inſurance upon the ſuppoſition of a total loſs of the voyage, when it turns out that the voyage was not loſt; but it is quite inconſiſtent with the abandonment, which is the voluntary choice of the aſſured to deny the eventual uſufruct of the property ſo abandoned. If after abandonment, as for the loſs of the voyage, the aſſured may ſtill retain the veſſel for the performance of all the contracts which he had previouſly entered into in reſpect of the ſhip, this reſervation might extend to ſeveral voyages; and even the ſame voyage may be protracted for two or three years from length of way or caſualties, as ſometimes happens with *Eaſt India* ſhips, during which time the repairs of the ſhip might equal her firſt coſt: and thus the aſſured, after receiving the full value of the ſhip, and deriving intereſt from the money, and getting rid of all further expence, would ſtill be receiving the earnings of the ſhip, in lieu of the underwriter who had paid the value of it and borne all the expences.

In reply it was obſerved, that ſome of the charges of proſecuting the voyage, ſuch as ſailors' wages and proviſions, would be borne by the underwriters on freight, and not by thoſe on the ſhip, according to *Robertſon* v. *Ewer* (*a*), and other caſes there cited. And as to other charges it was for the underwriters on ſhip to conſider whether it were worth their while under all the cir-

(*a*) 1 *Term Rep.* 127.

cumſtances

cumſtances to proſecute the voyage inſured after an abandonment. 1804.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment. The novelty of the queſtion in this caſe, the value of the property, and the extent to which ſome of the principles laid down in the argument ſeemed to lead, made the Court deſirous of every information on the different points which might ariſe between the ſeveral parties intereſted before we came to our deciſion; and therefore we wiſhed for the ſecond argument on the effect of an abandonment of the ſhip on the accruing freight. If the queſtion which ariſes upon this caſe be ſtripped of all extraneous circumſtances and conſiderations, it appears to us to reſolve itſelf into this ſingle point; viz. Whether the freight have been in this caſe loſt, or not? If the fact be merely looked at, freight in the events which have happened has not been loſt, but has been fully and entirely earned and received by or on the behalf of the plaintiffs the aſſured: And if ſo, no loſs can be properly demandable againſt the underwriters on freight, who merely inſure againſt the loſs of that particular ſubject by the aſſured. But if it have or can be conſidered as having been in any other manner or ſenſe loſt to the owners of the ſhip, it has become ſo loſt to them, not by means of the perils inſured againſt, but by means of an abandonment of the ſhip, which abandonment was *the act of the aſſured themſelves*, with which therefore, and the conſequences thereof, the underwriters on freight have no concern. It appears to us therefore that quacunque viâ datâ, that is, whether there has been no loſs at all of freight, or being ſuch, it has been a loſs only occaſioned

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occaſioned by the act of the plaintiffs themſelves, that they are not entitled to recover; and that therefore a nonſuit muſt in that caſe be entered.

Judgment of nonſuit.

Tueſday, June 19th.

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The 25th article of the treaty of *February* 1778, between *France* and *America*, which requires the veſſels of the two allies, in caſe either is at war, to be furniſhed with a paſſport expreſſing (inter alia) *the place of habitation* of the commander of the veſſel, is not complied with by a paſſport granting leave "to *G. D.* commander of the ſhip called the *M. V. of the town of P.*, of the burthen of," &c.; ſuch deſcription of place being applicable only to the *ſhip* as the laſt antecedent, which is further deſcribed by her burthen in a continuing ſentence; and therefore the plaintiff was holden not entitled to recover upon a policy of inſurance on ſuch ſhip warranted *American*, which had been captured by the French and condemned as prize.

THIS was an action of inſurance on goods on board the ſhip *Mount Vernon*, warranted an *American* ſhip, upon a voyage at and from *Philadelphia* to *London*, with liberty to touch at one port in the Channel. It was averred in the declaration, that Meſſrs. *Willings* and *Francis*, for whom the plaintiffs were agents, were the perſons intereſted in the goods inſured, and that the ſhip and cargo were in the courſe of the voyage inſured taken as prize by perſons unknown. At the trial at *Guildhall* a ſpecial verdict was found, ſtating in ſubſtance, that the defendant ſubſcribed the policy in queſtion, and that the parties named were intereſted in the goods inſured. That on the 2d of *June* 1796 the ſaid ſhip ſailed with her cargo from *Philadelphia* in the United States of *America* for *Cowes* in the *Iſle of Wight*, and for ſuch other port or place after her arrival at *Cowes* as the plaintiffs ſhould direct. That the ſhip previous to her ſailing from *Philadelphia* cleared out from thence for *Hamburgh*, and at the time of her ſailing until and at the time of her capture had on board the following documents, 1. a certificate of clearance, with a manifeſt of her cargo annexed thereto, viz. "Port of *Philadelphia*. Theſe are to certify "all whom it doth concern, that *George G. Dominick* "maſter or commander of the ſhip called the *Mount* "*Vernon*, burthen 424 $\frac{27}{95}$ tons, mounted with guns,

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" navigated with men, United States built, and " bound for *Hamburgh*, hath here taken on board cargo, " as per manifeſt annexed, and hath here entered and " cleared his ſaid veſſel according to law. And theſe " are further to certify, that it appears by the original " regiſter now produced to us that the above-mentioned " ſhip was regiſtered at *Philadelphia* the 2d of *May* 1796. " Given under our hands and ſeals of office at the " Cuſtom-houſe, this 30th of *May*, *John Graff* Deputy " Collector, *W. Tilton* D. &c." That the ſaid manifeſt of the cargo was entitled, " Manifeſt of the cargo of the ſhip *Mount Vernon*, *George G. Dominick* maſter, bound for *Cowes* and *Hamburgh* in *Europe*." 2. The following ſea-letter or paſſport, viz. (The ſpecial verdict here ſet forth a fac ſimile of the document in the form of a triplicate paſs, having three columns, the firſt in the *French*, the ſecond in the *Engliſh*, and the third in the *Dutch* language. What follows is a tranſlation of the *French*, which was the only part relied on in the argument as moſt favourable to the conſtruction contended for on the part of the plaintiffs.)

(FRENCH PASS.)

(*Tranſlated from the* French.)

" GEORGE WASHINGTON, Preſident of the United States of *America*.

" To all who ſhall ſee theſe preſents. Be it known, that leave and permiſſion has been granted *to* George G. Dominick, *maſter or commander of the ſhip called the* Mount Vernon, *of the town of* Philadelphia (*a*), *of the burthen of*

(*a*) In the *American* and *Dutch* columns it was thus expreſſed: " leave and permiſſion are hereby given to *George Dominick*, maſter or commander of the ſh called the *Mount Vernon*, of the burthen of 424 $\frac{95}{100}$ tons or thereabouts, *lying at preſent in the port of Philadelphia*, bound for *Hamburgh*."

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424 $\frac{17}{95}$ *tons, or thereabouts,* being at preſent in the port of *Philadelphia* and bound for *Hamburgh,* loaded with ſundries, per manifeſt: that after this ſhip has been viſited and before his departure he ſhall make oath before the officers authorized for this purpoſe, that the ſaid ſhip belongs to one or more citizen or citizens of the United States of *America,* the act whereof ſhall be placed at the foot of theſe preſents. And in like manner that he will keep and cauſe to be kept by his crew the maritime ordinances and regulations, and enter a liſt ſigned and confirmed by witneſſes, containing the names and ſurnames, the place of birth, and reſidence, of the perſons compoſing the crew of his ſhip, and of all thoſe who ſhall embark therein, whom he ſhall not receive on board without the knowledge and permiſſion of the officers thereto authorizing. And in every port or harbour where he ſhall enter with his ſhip he ſhall ſhow the preſent permiſſion to the officers authorized thereto, and ſhall make a faithful report to them of what has paſſed during his voyage, and he ſhall carry the colours, arms, and enſigns of the United States during his ſaid voyage. In teſtimony whereof we have ſigned theſe preſents, and have cauſed the ſeal of the United States to be thereto affixed, and to be counterſigned by *A. E.* deputy collector at *Philadelphia,* the 30th of *May* 1796."

The ſpecial verdict then ſet forth certain facts relative to the ownerſhip of the *Mount Vernon,* and her regiſter and certificate of regiſtry, and other documents, the regularity of which as applied to the voyage inſured were queſtioned in the argument. But it is unneceſſary to ſtate theſe and other facts, upon which no opinion was given by the Court. It is ſufficient, in order to raiſe the only

only point upon which the judgment ultimately turned; to ſtate the finding of the jury, that the documents ſtated were the clearance, regiſter, certificate of regiſtry, manifeſt, and *paſſport* relating to and on board of the ſaid ſhip for the voyage on which ſhe ſailed from *Philadelphia* on the 2d of *June* 1796. That before the making of the policy the plaintiffs had determined that the ſhip after touching at *Cowes* ſhould proceed from thence to *London*, and there finiſh her voyage, which was not known to the maſter at the time ſhe ſailed from *Philadelphia*; who then intended after touching at *Cowes* to proceed to *Hamburgh* and there finiſh the voyage. That the ſhip was built within the United States of *America* in the beginning of the year 1796; and when ſhe ſailed from *Philadelphia*, until, and at the time of the capture after mentioned, was the ſole property of one *Duncanſon*, who was born a *Britiſh* ſubject, but was domiciled, and reſided and carried on trade in the United States of *America* from *Auguſt* 1794 till after the 11th of *Auguſt* 1796; but was not entitled by the laws of the United States to be naturalized and become a citizen of the United States at the time the inſurance in queſtion was effected, nor when the ſhip ſailed on the voyage inſured, or was captured, nor until the 11th of *October* 1796, on which laſt-mentioned day he was naturalized and became a citizen of the United States. That on the 9th of *June* 1796 the ſhip, while proceeding on her voyage from *Philadelphia* to *Cowes*, was with her cargo captured as prize by a *French* cruizer, and was afterwards taken into the port of *St. John* in the *Spaniſh* iſland of *Porto Rico*; and while ſhe remained there ſhe and her cargo were proceeded againſt by the captors in the *French* proviſional tribunal of prizes in *St. Domingo*. The ſpecial verdict

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then ſet out the ſentence of condemnation of that court (upon which alſo much argument turned); and then ſet forth the 12th, 23d, 25th, and 27th articles of the treaty of 1778 between *America* and *France*; by the 25th article of which "it is agreed (*a*) that in caſe either of "the parties thereto ſhould be engaged in war, the "ſhips and veſſels belonging to the ſubjects or people "of the other ally muſt be furniſhed with ſea-letters or "paſſports, expreſſing the name, property, and bulk of "the ſhip, as alſo the name *and place of habitation of the* "*maſter or commander of the ſaid ſhip*, that it may appear "thereby that the ſhip really and truly belongs to the "ſubjects of one of the parties; which paſſport ſhall be "made out and granted according to the form annexed "to this treaty," &c. The ſpecial verdict concluded by ſetting forth two acts of the United States, one impoſing a duty on the tonnage of ſhips, and another regulating the regiſtering of ſhips; the object of which was to diſcriminate ſhips of the United States and owned by *American* citizens from thoſe of foreign countries or owned by foreigners. The application of theſe acts, which alſo furniſhed much matter for argument, became in the event unneceſſary to be conſidered.

The caſe was argued at great length and with much ability, upon a variety of grounds, by *Puller* for the plaintiffs in error in *Hilary* term laſt, and by *R. Carr* for the defendant in *Eaſter* term following: But as judgment was ultimately given upon an objection to the want of a

(*a*) This is taken from the *American* copy, which, ſo far as reſpects the point in judgment, correſponded with the *French* copy. In other reſpects there were variations, which furniſhed ground of argument on other parts of the caſe not material to be ſtated.

deſcription in the paſſport of the place of habitation of the maſter of the ſhip, which rendered it unneceſſary for the Court to give any opinion upon the other points made at the bar, it is needleſs to detail the arguments. After time taken to adviſe upon the caſe the judgment of the Court was now delivered by

Lord ELLENBOROUGH C. J. This caſe comes before the Court on a writ of error from the Court of Common Pleas, upon a ſpecial verdict found upon the trial of the cauſe before Lord *Alvanley*, to whoſe directions on that trial a bill of exceptions was tendered. And on the argument here ſeveral conſiderable queſtions have been raiſed, and diſcuſſed with great learning and ability on the one ſide and on the other: and if it were neceſſary for us to determine the ſeveral points which have been raiſed, as to whether the ſhip did or did not ſail on the voyage inſured; whether the ſhip were or were not an *American* ſhip, by reaſon of the tonnage act of the United States of that country; whether the paſſport, ſuppoſing its form unobjectionable, were a ſufficient document, owing to ſome vice in the mode of obtaining it; whether the evidence given of the ſhip's condemnation were properly received; and whether ſuch ſentence, if properly received, be concluſive againſt the ſhip being *American*; it would be proper to ſtate the record more at length than can be now required; as we think the objection which has been made to the form of *the paſſport* is an anſwer to the claim of the plaintiffs in error. It will therefore be ſufficient very ſhortly to ſtate ſo much of the ſpecial verdict as applies to that point only.

This action is on a policy of inſurance, dated the 18th of *June* 1796, on goods on board a ſhip called the *Mount*

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Vernon, an *American* ſhip, at and from *Philadelphia* to *London*, with liberty to touch at one port in the Channel. And the ſpecial verdict, after finding the making the policy, the ſubſcription of the plaintiffs in error, the intereſt as averred, the ſailing of the ſhip, and other matters not material to the ground of our deciſion, finds that by the 25*th article of the treaty* between *France* and *America*, which treaty was dated the 6th of *February* 1778, it was provided, "that in caſe either of the parties ſhould be "engaged in war, the ſhips and veſſels belonging to the "people of the other ally muſt be furniſhed with ſea-"letters or paſſports expreſſing the name, property, and "bulk of the ſhip, *as alſo the* name AND PLACE OF HABI-"TATION OF THE MASTER OR COMMANDER of the ſaid "ſhip, that it may appear thereby that the ſhip really and "truly belongs to the ſubjects of one of the parties; "which paſs ſhall be made out and granted *according to* "*the form annexed to the treaty*." And the ſpecial verdict further finds *the form of the paſſport*, which the ſhip had on board at the time of the capture, which was in the *French*, *Engliſh*, and *Dutch* languages, in which there is no mention made of the place of habitation of the maſter, unleſs it be in that part of the paſs, which was in *French*, and ran in this form: "To all who ſhall ſee theſe pre-"ſents, be it known, that leave and permiſſion has been "granted to *George G. Dominick*, maſter or commander "of the *ſhip called the* Mount Vernon, *of the town of* Phi-"ladelphia, *of the burthen of* $424\frac{37}{95}$ *tons* or thereabouts, "being at preſent in the port of *Philadelphia*, and bound "for *Hamburgh*, loaded with ſundries," &c. &c. not neceſſary to ſtate. Now as the deſcription of the ſhip in the ſaid policy clearly contains a warranty that ſhe was an *American* ſhip, which induces a neceſſity of her being docu-

documented, as *American* ſhips are required to be by the treaties ſubſiſting between that ſtate and *France*; and as the ſpecial verdict has not found what *the form of the paſſport* was which was annexed to the treaty, we were deſirous, if it could have been aſcertained, to have had it made a part of the ſpecial verdict; as by that we might have been enabled to have decided more ſatisfactorily to the perſons intereſted in this inſurance as to *the form of the paſſport* than we can as the caſe now ſtands: and if we had thought it ſufficient, then upon the other points which have been made in argument. But as this matter has not been added, we need only ſay, whether *the paſſport* found on board the ſhip be or be not conformable to the requiſites preſcribed by the 25th article of the treaty; that is, whether *the town of* Philadelphia can by any fair conſtruction be referred to *Dominick, the maſter of the ſhip*, or whether it do not according to the rules of ſound conſtruction relate, not *to him*, but *to the ſhip*: and, if it do, the conſequence is that the ſhip had not *ſuch a paſſport* as is required by this article of the treaty. And giving every weight to the arguments uſed in ſupport of the paſſport, we do not think that we can, without doing great violence to the plain and obvious import of its language, ſo conſtrue it, and ſay that the paſſport is that which the treaty requires. The rule of law as well as of grammar is that "ad proximum antecedentem *fiat relatio, niſi impediatur ſententia*;" for which, if authorities were wanting, *Jenkins Centuries*, 180, *Dyer*, 46. *b.* and 5 *Co.* 68. Lord *Cheyney*'s caſe, may be referred to. In this paſſport "*the ſhip called the* Mount Vernon" is unqueſtionably the laſt antecedent; and though it has been ſaid that *the port*, and not *the town*, of *Philadelphia* is the proper deſcription of a *ſhip*, yet as a *port* may be within

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a *town*, there is no inconſiſtency in deſcribing a ſhip as of the town within which the port lies; there is nothing in the matter which neceſſarily prevents its reference to the *ſhip*, and applies it to the *maſter*. But the proper reference does not in this caſe depend merely on this rule; for the words "*of the burthen of* 424 *tons*," which is a continuance of the ſame ſentence, and is a further deſcription of the ſame thing, can refer only to the *ſhip*: And of this opinion Lord *Alvanley* appears clearly to have been in the caſe of *Baring* v. *Claggett*, 3 *Boſ. & Pul.* 212.; only that it was unneceſſary in that caſe to decide upon the ground of this conſtruction of the paſſport, inaſmuch as that caſe ſtated that the ſhip had on board this paſſport, "*together with the uſual documents taken out by* American "*veſſels*;" under the terms of which general admiſſion Lord *Alvanley* thought the Court at liberty to preſume that ſhe had on board a *ſea letter* expreſſing the name and *place of abode of the maſter*, conformably to the treaty. In deciding merely on this point, all other queſtions between the parties remain open for future deciſion, if the plaintiffs in error, in an action to be brought againſt any other underwriter, ſhall be able to ſhew that the paſſport uſed in this caſe is that which *American* ſhips ought to be provided with; either by giving evidence that it is according to the form annexed to the treaty, or that which has been adopted by ſome ſubſequent treaty. As the caſe now ſtands, our opinion is, that the judgment of the Court of Common Pleas given for the defendant muſt be affirmed.

Judgment affirmed.

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BLOXAM Knt. and Others, Aſſignees of WARD, a Bankrupt, *againſt* HUBBARD.

Tueſday, June 29th.

1. An order of the Lord Chancellor made under the ſtat. 5 *Geo.* 2. *c.* 30. upon the petition of creditors, for removing one of ſeveral aſſignees of a bankrupt's eſtate, not followed up by any re-aſſignment or releaſe of ſuch aſſignee to the remaining aſſignees, nor by any new aſſignment of the commiſſioners under the Lord Chancellor's further order, does not operate to diveſt the legal eſtate out of ſuch removed aſſignee; and conſequently he ought to join in an action of trover brought by the aſſignees for a ſhip belonging to the bankrupt's eſtate.

IN trover, brought to recover two-third parts (*a*) of the ſhip *Fiſhburn*, tried before Lord *Ellenborough* C. J. at the ſittings after *Hilary* term 1804, at *Guildhall*, a verdict was found for the plaintiffs for 2326*l.* 6*s.* 8*d.* ſubject to the opinion of this Court upon the following caſe.

Thomas Ward the bankrupt, being the original and ſole regiſtered owner of the ſhip *Fiſhburn* belonging to the port of *Newcaſtle upon Tyne*, cleared the ſaid ſhip outwards for the *Baltic* in *April* 1800, where ſhe was detained for a conſiderable time by the embargo of the emperor of *Ruſſia*. On the 9th of *November* 1801 *Ward* by regular bill of ſale aſſigned the whole ſhip *Fiſhburn*, *then at ſea*, in conſideration of 4000*l.* to the defendant, who then reſided in *London*. The grand bill of ſale of the whole ſhip was alſo delivered to the defendant. On the 2d of *December* 1801 *Ward* committed an act of bankruptcy, upon which a commiſſion afterwards iſſued againſt him, and he was duly declared a bankrupt. On the 2d of *January* 1802 the defendant regiſtered the ſaid

2. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though the other aſſignees who ſue can only recover their proportional parts.

3. A ſale of a ſhip (which was afterwards loſt at ſea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a ſufficient converſion to enable the aſſignees of the bankrupt to maintain trover, without ſhewing a demand and refuſal.

4. The ſhip regiſter acts do not apply to a tranſfer of property by operation of law, ſuch as from the commiſſioners to the aſſignees of a bankrupt.

5. Under the ſhip regiſter acts 7 & 8 *W.* 3. *c.* 22. *ſ.* 21., and 26 *Geo.* 3. *c.* 60. *ſ.* 3, 4, 5. 16., and 34 *Geo.* 3. *c.* 68. *ſ* 15, 16., in order to make title to a ſhip ſold at ſea, whether in whole or in part, ſuch ſale muſt be acknowledged by indorſement of the certificate of regiſtry in the manner therein deſcribed, and a copy of ſuch indorſement be delivered by the vendee to the perſons authorized to make regiſtry, (which officers are *directed* to make an entry thereof to be indorſed on the oath or affidavit upon which the original certificate of regiſtry was obtained, and to make a memorandum in the book of regiſters, and to give notice thereof to the commiſſioners of the cuſtoms;) and it is not ſufficient for the vendee to regiſter ſuch ſhip de nova in another port where he reſided, though he removed the ſhip thither, and ſhe never returned to her original port after the ſale.

(*a*) One third part was recovered by *Heath*, in a former action of *Heath* v. *Hubbard*, 4 *Eaſt*, 110.

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ſhip de novo *in the port of* London, and the original certificate granted to *Ward*, which purported on the face of it to be of the ſhip *Fiſhburn* belonging to the port of *Newcaſtle-upon-Tyne*, was delivered up and cancelled. On the 19th of *February* 1802 the defendant ſold the whole of the ſaid ſhip by public auction to *Brown* and others for 3630*l.*, (the net proceeds being 3489*l.* 10*s.* 3*d.*), and by bill of ſale of the 5th of *April* 1802 aſſigned her to them, who afterwards ſent her to ſea, where ſhe was loſt on the 20th of *February* 1803. The *Fiſhburn* never returned to the port of *Newcaſtle-upon-Tyne* ſince ſhe cleared outwards from that port for the *Baltic* in *April* 1800; but the embargo being taken off ſhe arrived at *Plymouth*: but before the execution of the bill of ſale by *Ward* to the defendant ſhe ſailed again, and was abſent at the time of the execution thereof. She afterwards returned to the port of *London*, and immediately thereupon the defendant obtained a new regiſter. No tranſfer of property in the ſame ſhip, or any part thereof, appears in any document of the Cuſtom-houſe of *Newcaſtle-upon-Tyne* either to the plaintiffs or to the defendant; and no indorſement of tranſfer was ever made to the plaintiffs on the certificate of the ſhip's regiſtry; nor have the plaintiffs taken out a new regiſter; and no demand was proved on the trial to have been made of the ſhip upon the defendants. The plaintiffs, together with one *John Glen Johnſton*, (who did not join in the preſent action,) were appointed aſſignees of the eſtate and effects of *Ward* under the above-mentioned commiſſion, by an aſſignment dated the 13th of *April* 1802. On the 22d of *January* 1803 the Lord Chancellor by his order removed *J. G. Johnſton* from being an aſſignee; which order reciting that a petition had been preſented to the Lord Chancellor by the plaintiffs, being three of the creditors, and three

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of the aſſignees, ſtating that the ſaid *J. G. Johnſton* on the 7th of *December* 1801, being prior to the date of the ſaid commiſſion, received from the bankrupt, whilſt he was a priſoner for debt in the King's Bench priſon, and after he had committed one or more act or acts of bankruptcy, certain bills of exchange, which bills *J. G. Johnſton*, contrary to his undertaking to that effect, had refuſed to deliver up for the benefit of the eſtate of *Ward*, and that *J. G. Johnſton* had departed theſe kingdoms and was gone to *Peterſburgh* in *Ruſſia*; and praying (inter alia) that *J. G. Johnſton* might be diſcharged from being one of the aſſignees of *Ward*'s eſtate, concluded as follows: "Now upon hearing the ſaid petition read and what was "alleged by the counſel for the petitioners, I do order "that the ſaid *J. G. Johnſton* be forthwith removed "from being aſſignee of the ſaid bankrupt's eſtate and "effects; and let him and his partners be reſtrained "from receiving any dividend upon their debt proved "under the commiſſion againſt the ſaid *Thomas Ward* "until my further order. *Eldon* C." No re-aſſignment, releaſe, or other inſtrument hath been executed by *J. G. Johnſton* to the plaintiffs, nor any new aſſignment by the commiſſioners in conſequence of the ſaid order. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action? If the Court ſhould be of opinion that they were ſo entitled, then the verdict to ſtand, and judgment to be entered as the Court ſhould direct: otherwiſe a nonſuit to be entered.

Hall for the plaintiffs, after obſerving that this was the caſe of a trader, who having before his bankruptcy diſpoſed of a ſhip at ſea to the defendant had neglected to perform the requiſite acts for conveying the property

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to him according to the proviſions of the regiſter acts, for want of which it became veſted in the aſſignees of the bankrupt, ſtated three objections which he expected to be made to the recovery of ſuch aſſignees. 1ſt, That *J. G. Johnſton*, one of the original aſſignees of the bankrupt's eſtate, ought to have been joined in the action, the legal eſtate ſtill remaining in him until a new aſſignment from the old to the new aſſignees, notwithſtanding the Lord Chancellor's order to remove him. But the effect of that order was to diveſt the legal eſtate out of *Johnſton* and veſt it in the three other aſſignees, the plaintiffs. The bankrupt laws enable the commiſſioners to convey the bankrupt's property to aſſignees, who are joint truſtees for the creditors. On the death of one of the aſſignees it ſurvives to the others, and the order in queſtion has cauſed the legal death of *Johnſton*. The Lord Chancellor has a general and entire juriſdiction over theſe matters. The ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 30. only directs that in caſe of the removal of any aſſignee and the appointment of another by the creditors, the old aſſignee ſhall aſſign over to the new aſſignee: but that does not appear to be neceſſary where no new aſſignee is appointed. And *ſ.* 31. directs that where it ſhall be found neceſſary to vacate the firſt aſſignment and to make a new one, "the Lord Chancellor, upon petition of any creditors, may make ſuch order therein as he ſhall think juſt and reaſonable." "And in caſe a new aſſignment ſhall be ordered to be made as aforeſaid, ſuch debts, effects, and eſtate of ſuch bankrupt ſhall be thereby effectually and legally veſted in ſuch new aſſignees." It is not neceſſarily required to make ſuch order for a new aſſignment (*a*). And indeed

(*a*) A precedent was referred to in *Co. Bank. L.* 2 vol. 108. intitled "Aſſignment by one aſſignee to himſelf and a new aſſignee; the former aſſignee

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indeed where the depoſed aſſignee is abroad the Lord Chancellor's order on him to aſſign would be nugatory; and if the remaining aſſignees could not make title without him, the bankrupt laws could not be carried into execution. In the caſe ex parte *Bainbridge* (*a*), on the death of the laſt ſurviving aſſignee, leaving an infant heir at law, the Lord Chancellor made an order on the commiſſioners to execute a new aſſignment to two new aſſignees choſen. The joining in the action the depoſed aſſignee would be to annul in effect the Lord Chancellor's order, which not only diſcharges him, but reſtrains him from receiving any part of the bankrupt's eſtate. But if he were joined he would be empowered to receive what was recovered in the action. The Lord Chancellor has a ſimilar power in other caſes; as by ſtat. 36 *Geo.* 3. *c.* 90. *ſ.* 1. where any truſtees in whoſe names ſtock ſtands are abſent out of the juriſdiction, or not amenable to proceſs, or become bankrupt, &c. he may order the remaining truſtees to convey, and in other caſes may by his order diveſt the legal eſtate out of ſome, and veſt it in others. [*Le Blanc* J. There is an expreſs authority given by the act in that caſe to accompliſh the object.]. At any rate this objection, if valid, would only go to one-fourth of the property, and the plaintiffs, the three other aſſignees, would be entitled to recover the other three-fourths, there being no plea in abatement, and this being an action of tort; according to *Addiſon* v. *Overend* (*b*), and *Sedgeworth* v. *Overend* (*c*).

"ſignee having abſconded and become bankrupt." But upon inſpection it appears that the commiſſioners were parties to the new aſſignment.

(*a*) 6 *Veſ.* 451.

(*b*) 6 *Term Rep.* 766. and vide *Scott* v. *Goodwin*, 1 *Boſ. & Pull.* 73 and 75.; where the diſtinction between actions of contract and tort in this reſpect is ſhewn.

(*c*) 7 *Term Rep.* 279.

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2dly, The want of a converſion is objected; but a ſlight act will amount to it where a defendant has no title. The uſe or miſuſe of a thing is a converſion. A ſale by a ſheriff under an execution of the goods of a bankrupt, made after a commmiſſion of bankrupt iſſued, is in law a converſion (*a*). 3dly, If it be objected, that the plaintiffs as aſſignees ought to have derived title to themſelves, by ſhewing a transfer to them in the mode preſcribed by the regiſter acts 7 & 8 *W.* 3. *c.* 22., 26 *Geo.* 3. *c.* 60., and 34 *Geo.* 3. *c.* 68, it is ſufficient to anſwer that the property is veſted in them by operation of law, and that the regiſter acts do not contemplate ſuch a caſe, but only where property is transferred by the act of the party. Then ſuppoſing the plaintiffs entitled upon the ſtrength of their own title to recover the whole or at leaſt three-fourths, it will be inſiſted, 4thly, that the defendant has a good title. But that is directly contrary to the determination of the ſame facts in *Heath* v. *Hubbard* (*b*), where the Court held that what was done by the preſent defendant, the getting the ſhip regiſtered de novo in the port of *London*, per ſaltum, the ſale being of the ſhip at ſea then belonging to another port, without firſt delivering a copy of the bill of ſale to the officer of the port to which the ſhip then belonged, for the purpoſe of his indorſing an entry of ſuch transfer on the affidavit on which the original certificate of regiſtry was obtained, and making a memorandum thereof in the book of regiſtry, and giving notice of the ſame to the commiſſioners in *London*, as required by ſtat. 34 *Geo.* 3. *c.* 68. *ſ.* 16. was not ſufficient to make a title to the ſhip. But ſuppoſing that conſtruction of the act may be impeached, yet before that queſtion can be raiſed the authority of *Moſs and*

(*a*) *Cooper* v. *Chitty*, 1 *Burr.* 20. (*b*) 4 *Eaſt*, 110.

Others,

Others, aſſignees of Kirkpatrick, v. Charnock (*a*), muſt be gotten rid of; for here the regiſtry de novo in the port of *London*, whether ſufficient or not in itſelf to complete the title under the bill of ſale, was not done till after the act of bankruptcy, when the title of the aſſignees had intervened, and prevented its operation, by veſting the property in them. Under theſe circumſtances it was holden in that caſe that the aſſignees of the bankrupt might recover the poſſeſſion of the ſhip in trover from the vendee, though he had, ſubſequent to the bankruptcy, complied with all the requiſites of the regiſter acts.

Scott contrà. 1ſt, The mere order of the Lord Chancellor to an aſſignee to aſſign away the bankrupt's eſtate cannot, without an actual re-aſſignment, operate to diveſt the property out of ſuch aſſignee. The Lord Chancellor has no other power over a bankrupt's eſtate than what is given to him by ſtatute. The ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 26. firſt empowers the commiſſioners to transfer the property from the bankrupt to his aſſignees. By *ſ.* 30. any aſſignee removed or diſplaced by the creditors is required to aſſign the eſtate and effects to any other aſſignee choſen by them, under a penalty in caſe of refuſal or neglect. Then as it may ſometimes be neceſſary to vacate the old and make a new aſſignment, the Lord Chancellor has, by *ſ.* 31., a diſcretionary power to make an order for that purpoſe upon petition of any creditors. But this muſt be done by an expreſs order of the Lord Chancellor to vacate the former appointment and to make a new aſſignment. The inconvenience which may enſue from the aſſignee being abroad is no other than what may ariſe

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in every other caſe where a conveyance is neceſſary. 2dly, The ſale of the ſhip by the defendant, not being tortious at the time and under the circumſtances, is no converſion in law. There was a bonâ fide delivery of the ſhip from *Ward* the then owner to the defendant, and if *Ward* could not have maintained treſpaſs, neither could he have maintained trover. The defendant had at leaſt a rightful poſſeſſion, though with a bad title. Then the aſſignees cannot convert that which was at firſt a lawful poſſeſſion into a tortious one, without a demand and refuſal. In 5 *Com. Dig.* 541. *Treſpaſs* D. it is ſaid, that "a man ſhall not be charged in treſpaſs for goods which he had by the delivery of the party himſelf, except where by a wrongful act he makes himſelf a treſpaſſer ab initio. So in *Weymouth* v. *Boyer* (*a*), *Buller* J., ſitting for the Lord Chancellor, conſidered that trover would not lie againſt one in poſſeſſion and making ſale under the authority of the owner. And he ſaid, that if it were no converſion at the time of the ſale, no refuſal afterwards would do. So where one gives an authority for doing a thing, he cannot for any ſubſequent cauſe puniſh that which is done by his own authority. 8 *Co.* 146. *b.* 3dly, The plaintiffs as aſſignees are bound to make title to the ſhip with all the formalities required by the regiſter acts. They take the bankrupt's eſtate by the conveyance of the commiſſioners in the ſame manner as property is conveyed to any other. By ſtat. 13 *Eliz. c.* 7. perſons purchaſing copyhold from the commiſſioners muſt compound with the lord like any other purchaſers. And in *Drury* v. *Man* (*b*) it was ruled, that aſſignees of bankrupts ſtood in the ſame relation to the lord of the copyhold as any other vendors. Beſides, if ſuch aſſignees

(*a*) 1 *Veſ. jun.* 416. 424. (*b*) 1 *Atk.* 95.

were

were not bound to take a conveyance of a ſhip under the regiſter acts like others, the policy of the law would be greatly defeated; for many aſſignees are foreigners, who would by the medium of a bankruptcy become owners of *Britiſh* ſhips. But 4thly and principally, the defendant has done every thing required by the regiſter laws to complete his title: and therefore the caſe of *Heath* v. *Hubbard* (*a*) proceeded on a miſtake of thoſe laws. The ſtat. 12 *Car.* 2. *c.* 18. does not provide for any caſe of transfer of ſhips. The ſtat. 7 & 8 *W.* 3. *c.* 22. is the firſt which regulates the transfer between individuals: and that requires (*ſ.* 21.) that "upon any transfer of property to *another* port" the ſhip ſhall be regiſtered *de novo*, and the former certificate delivered up to be cancelled; and that "upon any alteration of property in the *ſame* port, by the ſale of one or more ſhares in any ſhip after regiſtering thereof, *ſuch* ſale ſhall be acknowledged by indorſement on the certificate of the regiſter." By "*transfer of property to another port*" muſt be underſtood to ſome *perſon* reſiding at another port, by which the home of the ſhip would be changed (*b*); and in this caſe the direction is expreſs that the ſhip ſhall be regiſtered *de novo*, and that the certificate of the former regiſtry ſhall be cancelled, and therefore no indorſement can be made of it; but ſuch indorſement is to be and can only be made upon any alteration of property, by the ſale of one or more ſhares to perſons in the *ſame* port. The regulations were adopted to preſerve the evidence of the ownerſhip of *Britiſh* veſſels remaining in *Britiſh* ſubjects with the leaſt trouble, delay, and expence to individuals. It is evident in this ſtatute that the word SUCH (*i. e.* "ſuch ſale ſhall be acknowledged by indorſement on the cer-

(*a*) 4 *Eaſt*, 110. (*b*) Vide 26 *Geo.* 3. *c.* 60. *ſ.* 5.

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tificate of the regiſter") is neceſſarily confined to an alteration of property in the *ſame* port. The 16th ſect. of the 26 *Geo.* 3. *c.* 60. reciting that the proviſions made in the laſt-mentioned act, "touching the indorſement on certificates of regiſtry, in caſe of any alteration of property in any ſhip in the *ſame* port to which ſhe belongs have been found inſufficient," directs further regulations to be complied with beſides the indorſement thereby required. The ſame words are again referred to in ſect. 15 of the ſtat. 34 *Geo.* 3. *c.* 68. which gives a form of the indorſement required to be made on the certificate of regiſtry, in caſe of any alteration of property in the *ſame* port to which the ſhip belongs. Then the 16th ſection of the laſt act provides, "that if any ſhip ſhall be at ſea, "or abſent from the port to which ſhe belongs at the "time when *ſuch* alteration in the property thereof ſhall "be made as aforeſaid, ſo that an indorſement on (*a*) "the certificate cannot be immediately made, the ſale, "&c. ſhall notwithſtanding be made by a bill of ſale," &c. and a copy thereof ſhall be delivered, and an entry thereof indorſed on the oath or affidavit, and a memorandum thereof be made in the book of regiſtry, and notice given to the commiſſioners of the cuſtoms, &c. Now in commenting on the words of this laſt clauſe the Lord C. J. in the caſe of *Heath* v. *Hubbard*, conſidered that the word *ſuch* (ſuch alteration in the property) meant the ſame as *any* alteration. But it muſt rather be taken to refer to *ſuch* alteration as was mentioned in the preceding ſection, to which it has evident relation;

(*a*) In the caſe of *Heath* v. *Hubbard*, 4 *Eaſt*, 120. an error was noticed in the printed ſtatute l. 3. of this clauſe, "indorſement *or* certificate" for "indorſement *on the* certificate." And vide the Lord C. J.'s reading of it in page 128. *ib.*

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and the alteration there mentioned is an alteration of property in the *ſame* port, the ſame which was ſtated in the ſtat. 7 & 8 *W.* 3. which required an indorſement on the certificate of the former regiſtry, and which is there plainly contradiſtinguiſhed from a transfer of property to *another* port, which required a regiſtering *de novo* and a delivery up of the old certificate to be cancelled. If the ſhip had been in her proper port at the time of the ſale, the caſe could not have been at all affected by the 16th ſection, which is only applicable to transfers of property at ſea or out of the proper port. Neither would it have fallen within the 15th ſection, becauſe that is expreſsly confined to any alteration of property in the *ſame* port to which the ſhip belongs. And the 16th ſection only applies to the caſe of a ſhip abſent from its own port, which, if at home at the time of the ſale, would have fallen within the 15th ſection, and conſequently cannot affect the preſent caſe, which is that of a *whole* ſhip tranſferred to *another* port, which at any rate requires a new regiſter by the ſtat. 7 & 8 *W.* 3. *c.* 22. *ſ.* 21. And the ſtat. 34 *Geo.* 3. *c.* 68. *ſ.* 20, 21, and 22. confirms the diſtinction of the two modes of transfer, and extends the authority of the officers in certain caſes to give new regiſters, even in the caſe of partial transfers in the ſame port. Then if this diſtinction be well founded, and this is a caſe where no indorſement of any certificate was neceſſary to convey the title from the vendor, but only a ſubſequent new regiſtration, which is the act of the vendee himſelf, and merely calculated to give him the privileges of the *Britiſh* navigation, the caſe of *Moſs* v. *Charnock* (*a*) does not apply, where a further act remained

(*a*) 2 *Eaſt*, 399.

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to be done by the bankrupt after his bankruptcy, in order to complete the title.

Hall, in reply to the firſt objection to the plaintiff's action, as to the not joining the removed aſſignee, becauſe the Ld. Chancellor had not purſued the 31ſt ſection of the ſtat. 5 *Geo.* 2. *c.* 30. by vacating the former and appointing a new aſſignment to be made, obſerved, that the power at firſt given to the Lord Chancellor, was general, "to make ſuch order as he ſhould think juſt and reaſonable:" and then the clauſe proceeds to ſtate, that "*in caſe* a new aſſignment ſhall be ordered to be made," the bankrupt's eſtate "ſhall be effectually and legally veſted in ſuch new aſſignee," &c. which aſſumes that a new aſſignment is not neceſſary at all events to be made. And here it was not neceſſary, becauſe there were other aſſignees remaining in whom the whole legal eſtate was already veſted when *Johnſtone* was removed. To the ſecond objection he anſwered, that however rightful a bare poſſeſſion might have been at firſt, and until a demand and refuſal, at any rate the defendant's taking upon himſelf to make ſale of the ſhip without title was an actual converſion. As to the third objection, it was before anſwered. As to the fourth, which went to the defendant's title, the preliminary objection grounded on the caſe of *Moſs* v. *Charnock* remains unanſwered; for the due regiſtering of the ſhip was as neceſſary to complete the title to her, whether to be done by the vendor or vendee, as the bill of ſale. And the only diſtinction taken in the caſe of *Heath* v. *Hubbard* was between ſuch acts as were neceſſary to be done by either of the parties, and ſuch as were to be done by the officers or third perſons, which latter alone were conſidered as *directory*, and not affecting the title.

And

And here the ſhip was not regiſtered de novo (even if that would otherwiſe have done) till after the bankruptcy; and the bill of ſale alone could not give the title. But in no inſtance now can a regiſter de novo be granted without ſhewing a compliance with all the requiſites of the 15th and 16th ſections of the ſtat. 34 *Geo.* 3. *c.* 68. For the 20th ſection enacts, that when the property in any veſſel ſhall be transferred to any other ſubject in *whole* or in *part*, and ſuch veſſel ſhall be required to be regiſtered de novo, the proper officer ſhall require the bill of ſale to be produced to him, &c. "Provided that all the *other* regulations required by the laws in force concerning the regiſtry *de novo* of veſſels be complied with." This preſumes that there are other regulations beſides the production of the bill of ſale, and theſe are only to be found in the 15th and 16th ſections.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment. There were three objections taken in this caſe to the plaintiffs' right to recover, founded on a ſuppoſed defect in the *title of the plaintiffs* to the ſhip in queſtion. The firſt objection was, that *John Glen Johnſtone, one* of the *aſſignees*, (in reſpect to whom the Chancellor's order for removing him from being an aſſignee is within ſtated,) ought, notwithſtanding ſuch order, to have been joined as a plaintiff, inaſmuch as his intereſt as aſſignee was not diveſted by the mere operation of ſuch order; but that a new aſſignment by the old to the new aſſignees, whereby the debts, effects, and eſtate of the bankrupt ſhould be "effectually and legally veſted in ſuch new aſſignees," was neceſſary for this purpoſe. A ſecond was, that there

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was *no converſion* of the ſhip in this caſe proved to have been committed by the defendant. The third objection was, that the plaintiffs, as aſſignees, ought to have derived a title to themſelves, by ſhewing a compliance with all ſuch forms as are required by the ſeveral ſtatutes on the ſubject, to give effect to transfers of property in ſhips in other caſes. Suppoſing however the plaintiffs' right to recover not to be defeated on any of theſe grounds, it was then further inſiſted, on the part of the defendant, that *the defendant himſelf* had a good *right* to the ſhip in queſtion, in virtue of his purchaſe, and the regiſtration of the ſhip de novo in the port of *London*, as ſtated in the caſe.

As to the firſt of theſe objections, aſſuming it to be well founded, and we think it ſo, it has only the effect of precluding the plaintiffs, who are *three* out of the *four* aſſignees in whom the property of the ſhip originally was (and until a new aſſignment is made under the order of the Lord Chancellor, continues to be) veſted, from recovering more than their three-fourth parts in value of the property in queſtion. For it is now too well ſettled to be any longer diſputed in a court of law, that the defendant can only avail himſelf of an objection of this ſort, viz. *that all the ſeveral part owners in a chattel have not joined in an action of treſpaſs, or of tort brought in reſpect to it, by plea in abatement.* I will only refer to *Addiſon* v. *Overend*, 6 *Term Rep.* 766, in which moſt of the caſes on the ſubject are collected; and *Sedgworth* v. *Overend*, 7 *Term Rep.* 279.

As to the ſecond objection, viz. that there is no proof of any *converſion* by the defendants of the ſhip in queſtion; if in the reſult it ſhall appear that *the defendant had no title to the ſhip in queſtion* at the time when he ſold her

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by public auction on the 19th of *February* 1802, and afterwards, on the 5th of *April* 1802, aſſigned her to perſons who ſent her to ſea, where ſhe was loſt, it will in that caſe be very difficult to ſtate an inſtance of an actual converſion to their own uſe more abſolute and perfect on the part of the defendant than this. And though *Ward* could not, as the defendant's counſel ſaid, have complained of the ſale by *Hubbard* as a tortious act, it does not follow from thence that his aſſignees cannot. *Ward* could not have maintained trover for the ſhip againſt *Hubbard* while in his poſſeſſion; but the plaintiffs, his aſſignees, moſt unqueſtionably might have brought ſuch action if the property in the ſhip paſſed to them under the commiſſion. It is by no means true, as a general propoſition, that the aſſignees can maintain no other actions than what might have been maintained by their bankrupt. A bankrupt cannot recover the value of goods he had delivered in purſuance of a purpoſe of fraudulent preference in contemplation of bankruptcy, which his aſſignees may, and in daily practice conſtantly do. And many other inſtances to the ſame effect might be put.

As to the third objection, that the plaintiffs as aſſignees ought to have derived title to themſelves by a compliance with the requiſites of the ſtatutes 26 *Geo.* 3. and 34 *Geo.* 3. (called Lord *Liverpool*'s Acts) in reſpect to the transfer of property in ſhips; it is an objection which, if it could prevail, would have the effect of defeating every title that has been hitherto made under a commiſſion of bankrupt to this ſpecies of property ſince the paſſing of thoſe ſtatutes. For I believe that in no inſtance the requiſites of thoſe ſtatutes will be found to have been complied with in regard to aſſignments by commiſſioners of bankrupt.

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But there is no ground for this objection. Theſe ſtatutes only relate to transfers made by the act of the parties, viz. from a *former owner* to a new *owner*, and where the transfer is capable of being effectuated in the ordinary way by the mere operation of an inſtrument of aſſignment from the one party to the other, and do not relate to transfers deriving their effect by peculiar proviſion or operation of law, as aſſignments by commiſſioners of bankrupt to aſſignees under the bankrupt laws do. There the commiſſioners are not *former owners*; they do not *ſell* in the ſenſe in which the word *ſale* is uſed in theſe ſtatutes 26 and 34 *Geo.* 3.; although in purſuance of the directions of the ſtat. 13 *Eliz. c.* 7. *ſ.* 2. and other later ſtatutes, they *make ſale thereof* in point of form by deed indented and inrolled, &c. as being the means ſpecially appointed and deſcribed by the latter of thoſe ſtatutes for the execution of the *power* given to the commiſſioners in this reſpect, for the veſting of ſuch property of the bankrupt in his aſſignees accordingly. The form of indorſement on change of property in the 15th ſection of the ſtat. 34 *Geo.* 3. *c.* 68. clearly ſhews that the *ſale* therein meant was a *ſale* from a *former proprietor*. It runs thus: "Be it remembered, that [*I* or *we*] [names, reſidence, and occupation, of the *perſons ſelling*] have this day ſold and transferred all [*my* or *our*] right, ſhare, or intereſt, in and to the ſhip or veſſel," &c. But how can commiſſioners of bankrupt poſſibly be conſidered as perſons ſelling any *right, ſhare, or intereſt of their own* within the meaning of theſe words [*my* or *our*]? The property transferred by them is neither legally nor equitably *theirs*: it does not veſt in them for an inſtant: it paſſes *by* them, or rather by the act they are directed and empowered to perform, and not *through* them. It appears

pears therefore to us that the aſſignments made by commiſſioners of bankrupt to the aſſignees of a bankrupt were not meant by the legiſlature to be comprehended in the proviſions directed to be purſued in reſpect to the transfer of property in ſhips between ſellers and buyers; and that of courſe the aſſignment in this caſe is not liable to the objection which has been made on this ground. If indeed this objection were allowed, it would alſo defeat the object of proviſional aſſignments, ſo far as reſpects a bankrupt's ſhip, and the crown's extent would conſtantly have the preference.

Suppoſing therefore that the title of the plaintiffs to recover in this action is not affected by any of theſe three objections, it remains to be conſidered whether the defendant has upon the face of this caſe a good title to the ſhip in queſtion, in virtue of his purchaſe and the ſubſequent regiſtration de novo above ſtated? And this depends upon the proviſions contained in the ſtatutes 7 & 8 *W.* 3. *c.* 22.; 26 *G.* 3. *c.* 60.; and 34 *G.* 3. *c.* 68. as far as they reſpect the transfer of the entire property in a ſhip, and particularly upon the application of the proviſions contained in the 16th ſection of the ſtat. 34 *G.* 3. *c.* 68. to the caſe of a transfer of the entire property in a veſſel *when at ſea* or *abſent from the port to which ſhe belongs*, as this ſhip was at the time when the aſſignment of it was made to the defendant. And firſt, the ſtat. 7 & 8 *W.* 3. *c.* 22. *ſ.* 21. provides, that no ſhip's name ſhall be changed without *regiſtering ſuch ſhip de novo*, which is required to be done *upon transfer of property to* ANOTHER *port*, and delivering up the former certificate to be cancelled. And in caſe there be any alteration of property *in the ſame port* by the ſale of *one or more ſhares* in any ſhip after regiſtering thereof, *ſuch* ſale ſhall always

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be acknowledged by *indorſement* of the certificate of regiſtry before two witneſſes, in order to prove that the *entire* property in ſuch ſhip remains to ſome of the ſubjects of *England*. It is to be obſerved, that here is no proviſion in caſe of ſale of the ſhip *at the ſame port*, for proving it to continue *Engliſh* property, if an indorſement on the certificate be only to be made in the caſe of a *partial* ſale; for a new regiſter is not required but on a transfer to *another port*. The ſtat. 26 *G.* 3. *c.* 60. *ſ.* 3. reciting that it is expedient that the proviſions made in the ſtat. 7 & 8th of King *William* ſhould *be altered and amended*, and that the ſame ſhould be extended and applied to ſhips other than thoſe therein deſcribed, enacts what ſhips ſhall be regiſtered. And by *ſ.* 4. directs that no regiſtry ſhall be made but *at the port to which ſuch ſhip or veſſel properly belongs*. And *ſ.* 5. enacts that the *port, to which any ſhip or veſſel ſhall thereafter be deemed to belong* within the meaning of that act, ſhall be the port from and to which ſuch ſhip *ſhall uſually trade*, or being a *new* ſhip ſhall *intend* to trade, and at or near which the huſband or acting manager, or owner, uſually reſides. The 16th ſection, reciting, that the proviſions made in and by the ſaid recited act touching the indorſements on certificates of regiſtry, in caſe of ANY *alteration of property in any ſhip or veſſel in the ſame port, to which the ſhip or veſſel belongs*, have been found inſufficient, enacts that in every *ſuch* caſe, beſides the indorſement required by the ſaid recited act, there ſhall alſo be indorſed on the certificate of regiſtry before two witneſſes, the town, place, or pariſh, where all and every perſon or perſons *to whom* THE PROPERTY *in any ſhip or veſſel, or any part thereof*, ſhall be *ſo transferred*, ſhall reſide, &c.; and the perſon, to whom *the property* of ſuch ſhip or veſſel ſhall be ſo transferred,

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ſhall deliver a copy of ſuch indorſement to the perſons authoriſed to make regiſtry, and who are to make an entry thereof to be indorſed on the oath or affidavit upon which the original certificate of regiſtry was obtained, and to make a memorandum in the book of regiſters, and give notice to the commiſſioners of the cuſtoms. This clauſe ſpeaks of transfer of the property in *the ſhip or any part thereof*; either conſidering the proviſions for indorſement made by the ſtatute of King *William* as extending to a transfer of *the whole*, or meaning to remedy the defect in their not being already ſo extenſive. It is either a *legiſlative expoſition* of the ſtatute of King *William*, or an *enlargement* of it. The ſtat. 34 *G.* 3. *c.* 68. *ſ.* 15., reciting, that by the laws now in force upon *any* alteration of property in any ſhip or veſſel in the ſame port to which ſuch ſhip or veſſel belongs, an *indorſement* upon the certificate of regiſtry is required to be made, enacts that ſuch indorſement ſhall be made by the perſon "*transferring* THE PROPERTY *of the ſhip or veſſel*," *&c.* and preſcribes the form. This clauſe alſo conſiders the indorſement neceſſary upon *any* alteration of property, and does not ſpeak of the perſon ſelling *one or more ſhares in the veſſel*, but of perſons "*transferring the* PROPERTY *of the ſhip.*" And this act is in furtherance of the proviſions of the ſtat. 26 *G.* 3. It is to be obſerved alſo, that the expreſſion in the ſtatute, of an alteration of property taking place *in the port* to which the ſhip belongs, means *when the ſhip is in the port* at the time the change of property takes place; in which caſe ſuch change is to be indorſed on the certificate of regiſtry; and is put in oppoſition to the caſe of the ſhip being *abſent from the port*, or *at ſea* (which is the object of the 16th ſection of this act), in which caſe the certificate being with the ſhip, the change

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change of property cannot be indorſed thereon, and is therefore directed to be noticed on the oath and in the book of regiſters. The 16th ſection, as already obſerved, provides for the caſe of the abſence of the ſhip from the port to which ſhe belongs at the time when *ſuch alteration* in the property thereof ſhall be made as aforeſaid. *That alteration*, by reference to the preceding ſection, is *any alteration*, and, by referring again to the 16th ſection of the ſtat. 26 *G.* 3. is *any alteration by which the property in any ſhip* or *any parts* thereof may be *transferred.* If theſe proviſions be to be conſtrued as being confined and limited to the transfer only of *ſhares and parts* of ſhips, this miſchief might follow, viz. that the whole of the ſhip might by bill of ſale be transferred to a *foreigner*, and if ſhe did not change her port, the veſſel might ſtill trade with all the advantages of a *Britiſh* ſhip. But no ſuch thing can happen, if the certificate of the regiſtry be indorſed, as that muſt be ſhewn to the officers of the cuſtoms when required. And what reaſon can there be, if a ſhip be at ſea, and *any ſhares* be ſold, that the proviſions of the 16th ſection of the ſtat. 34 *G.* 3. ſhould be complied with; but not, if the *whole* be ſold? For according to that conſtruction, at leaſt until the return of the ſhip, all the miſchiefs intended to be prevented by the 16th ſection as to the transfer of *parts* of the ſhip would ſubſiſt as to the *whole* ſhip, if transferred when at ſea. In *M'Neil's* caſe in *Reeves' Hiſtory of Shipping*, p. 504. Lord *Camden*, preſident of the council, ſaid, that he thought the ſtat. 26 *G.* 3. was an act which in every view of it ſhould be conſidered as a *remedial* act; it was to prevent a public miſchief; *to amend and alter* the ſtat. 7 & 8 *W.* 3. It had appeared that frauds without number were committed under that act; and that was ſtated

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to be the reaſon of making the ſtat. 26 *G.* 3. The rule therefore of conſtruction in applying and explaining the act ſhould be ſuch as will moſt aid the advancing the means of relief and in ſuppreſſion of fraud. And adopting this rule of conſtruction, and collecting the intention of the legiſlature as well as we are able from theſe ſeveral acts of Parliament, we feel ourſelves obliged to conſider the proviſion contained in the 16th ſection of the ſtat. 34 *G.* 3. *c.* 68. as to the alteration of property "in a ſhip or veſſel *at ſea*, or *abſent from the port* to which ſhe belongs," as applying to *any* alteration of property in the ſhip or veſſel, whether the ſame be made by the transfer of the *whole* or by the ſale of *any ſhare* or *number of ſhares* therein, amounting to leſs than the whole intereſt in ſuch ſhip or veſſel. And as ſuch proviſions have not been purſued in reſpect to the aſſignment of this ſhip made on the 9th of *November* 1801, when it is ſtated to have been *at ſea*, we think that no intereſt therein has paſſed to the defendant by his purchaſe and regiſtration *de novo* ſtated in the caſe; and that conſequently the plaintiffs are entitled to retain the benefit of the verdict found for them to the extent of 1744*l.* 15*s.* and coſts, being three-fourth parts of the ſum of 2326*l.* 6*s.* 8*d.* mentioned in the caſe as the damages found for the whole ſhip; and the verdict being thus altered, we direct that judgment be entered for the plaintiffs accordingly.

Poſtea to the plaintiffs.

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Tueſday, June 19th.

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A carrier by water contracting to carry goods for hire *impliedly* promiſes that the veſſel ſhall be tight and fit for the purpoſe, and is anſwerable for damage ariſing from leakage. And this, tho' he had given notice "that he would not be anſwerable for *any* damage *unleſs* occaſioned by want of ordinary care in the maſter or crew of the veſſel, in which caſe he would pay 10*l.* per cent. upon ſuch damage, ſo as the whole did not exceed the value of the veſſel and freight." For a loſs happening by the perſonal default of the carrier himſelf (ſuch as the not providing a ſufficient veſſel) is not within the ſcope of ſuch notice, which was meant to exempt the carrier from loſſes by accident or chance, &c; even if it were compe ent to a common carrier to exempt himſelf by a ſpecial acceptance from the reſponſibility caſt upon him by the common law for a reaſonable reward to make good all loſſes not ariſing from the act of God, or the king's enemies.

THIS was an action of aſſumpſit, brought to recover the amount of damage done to a quantity of yarn of the plaintiffs, delivered on board a lighter of the defendant's, to be carried therein from a quay at *Hull* to a ſloop of one *William Barton* lying in a dock there, and to be delivered on board the ſame, for a reaſonable reward to be paid to the defendant. The declaration ſtated (amongſt others) a promiſe by the defendant that the lighter *was tight and capable of carrying the yarn;* alſo a promiſe by him that the lighter was ſo far as he knew *a proper and ſubſtantial veſſel fit for carrying the yarn without damage;* and alſo a promiſe by him *to ſtow, load, and carry the yarn carefully,* and with due attention to the ſame. Plea non aſſumpſit. On the trial before *Thomſon* B. at the laſt *York* aſſizes, a verdict was found for the plaintiffs, ſubject to the opinion of this Court on the following caſe:

On the 10th of *June* 1802 ſeveral bales of yarn belonging to the plaintiffs were delivered on board the lighter, of which the defendant was the owner, in manner, and for the purpoſe above mentioned. The defendant kept ſloops for carrying other perſons' goods for hire, and alſo lighters for the purpoſe of carrying theſe goods to and from his ſloops; and when he had not employment for his lighters for his own buſineſs, he let them for hire to ſuch perſons as wanted to carry goods to other ſloops. Previous to the delivery the maſter of the defendant's lighter, when he was applied to to fetch

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the yarn, undertook to bring it in the lighter to the ſloop; and being aſked if the lighter were fit to carry it, ſaid, *it was very fit and tight*, and that he had been down the day before with hemp and flax in her to ſome of their veſſels at *South End*. In carrying the yarn in the lighter to the ſloop the lighter leaked, and ſome of the bales of yarn were thereby wetted and damaged; and on the arrival of the lighter at the ſloop the maſter of the lighter, on its being mentioned to him that he had got water in his boat, ſaid, there was a bit of a weep (meaning a leak) abaft. Three or four of the bales of yarn were ſtowed upon the top of the pump, by which it was rendered entirely uſeleſs until they were removed. Before the ſecond bale of yarn could be hoiſted into the ſloop the lighter was going down, and would have ſunk to the bottom of the dock with the reſt of the bales, but was prevented by getting tackle fixed to her to get her up. The damage thereby done to the yarn amounted to 274*l.* 16*s.* 4*d.* The lighter was *not tight and ſufficient for the carriage of the yarn*, but was *leaky*: and the *maſter* of the lighter was guilty of *negligence* in not ſtowing the yarn properly. Previous to the ſhipping of the yarn on board the lighter the defendant publiſhed the following notice, of which the perſon who ſo ſhipped the yarn on behalf of the plaintiffs had notice, he himſelf being one of the perſons who ſigned the ſame. "Navigation of the "River *Humber* and of the rivers falling into the ſame. "To all merchants, tradeſmen, and others. We whoſe "names are hereunto ſubſcribed (by ourſelves or by our "reſpective agents) do hereby ſeverally give notice, that "we will not be anſwerable for *any* loſs or damage which "ſhall happen to any cargo which ſhall be put on board "any of our veſſels, unleſs ſuch loſs or damage ſhall

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"happen or be occaſioned by want of ordinary care and "diligence in the maſter or crew of the veſſel; when "and in ſuch caſe we will pay to the ſufferers 10*l.* per "centum upon ſuch loſs or damage, ſo as the whole "amount of ſuch payment ſhall not exceed the value of "the veſſel on board whereof ſuch loſs or damage ſhall "have happened, and the freight of ſuch veſſel. And "we do hereby give this further notice, that any mer-"chant or other perſon deſirous of having their goods "or merchandize carried *free of any riſk* in reſpect of "loſs or damage, whether the ſame ſhall happen from "the act of God or *otherwiſe*, may have the ſame ſo "carried by entering into an agreement for the payment "of an *extra freight, proportionable* to the accepted reſpon-"ſibility, on application to us or our reſpective agents. "*Hull, October* 1, 1800." This notice was ſigned by the defendant and by 49 other owners of veſſels at *Hull*. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to more than 10*l.* per cent. upon the above damages? If they were ſo entitled, the verdict was to be entered for the plaintiffs for the above ſum of 274*l.* 16*s.* 4*d.*; if they were not ſo entitled, then the verdict was to be entered for the plaintiffs for the amount of 10*l.* per cent. upon the damages.

Holroyd for the plaintiff, after premiſing that the whole facts of the caſe, and even the terms of the notice, ſhewed that the defendant was a common carrier, contended that in that character he was anſwerable by law for every loſs except by the act of God or the king's enemies, and that he could not diſcharge himſelf from ſuch reſponſibility by any notice. Beſides which every maſter is liable for the actual negligence or miſconduct of his ſervant acting

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within the ſcope of his employment, of which liability he cannot by any general notice diveſt himſelf. The common law attaches upon carriers by water as well as by land from one part of the kingdom to another, and their general reſponſibility is founded on public policy which it is the object of the notice in queſtion to contravene. In *Kirkman* v. *Shawcroſs* (*a*), Lord *Kenyon* conſidered that innkeepers and common carriers could not get rid of their legal reſponſibility, the one for the ſafe cuſtody of the goods of their gueſts, the other for ſafe carriage, though the latter might ſtipulate for a ſpecial reward adequate to the riſk. That opinion was approved in *Oppenheim* v. *Ruſſell* (*b*). And the diſtinction was more expreſsly taken by Lord *Kenyon* in *Hide* v. *The Proprietors of the Trent and Merſey Navigation* (*c*), between where a man is chargeable by law generally, as in the caſe of a common carrier, and where on his own contract: in the former he is liable for all loſſes, except thoſe ariſing from the act of God or of the king's enemies, and cannot, ſays his Lordſhip, diſcharge himſelf from them by any act of his own, as by giving notice to that effect. So ſaid Lord *Holt* in *Lane* v. *Sir R. Cotton* (*d*), though erroneouſly applied to the caſe of a poſtmaſter. There is no need of a contract, for the law makes him anſwerable. He has a reward; which is the reaſon in the caſe of innkeepers, *hoymen*, &c. who are bound to keep ſafely and anſwer all neglects of thoſe who act under them, *though they ſhould expreſsly caution againſt it.* Now here the notice is not that the carrier will not be liable without a certain adequate price for his riſk, which would admit of a different conſideration, but that he will not be liable at all where

(*a*) 6 *Term Rep.* 17. (*b*) 3 *Boſ. & Pull.* 42.
(*c*) 1 *Eſp. N. P. Caſ.* 36. (*d*) 1 *Salk.* 18. 12 *Mod.* 481—3. S. C.

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the loſs does not happen from want of care of the maſter and crew, nor even then for above ſo much per cent. But no perſon can exempt himſelf from a common law obligation, without at leaſt ſome conſideration moving to the perſon to whom he is liable; ſuch, perhaps, as his agreeing to carry for leſs than the uſual reaſonable price, (as is the common caſe where parcels are of leſs than 5*l.* value, or paid for accordingly); otherwiſe it is nudum pactum. If indeed a carrier charge more than reaſonable rates he may be indicted for extortion. Here there is no conſideration for the exception; and therefore the common law liability attaches upon a carrier for loſſes by the want of care of thoſe whom he employs in his buſineſs, which is the ſame as his own. For qui facit per alium facit per ſe. And this liability ſometimes extends to charge him even criminally. As where a bricklayer's ſervant leaves the rubbiſh of his work in the ſtreet, the maſter is indictable for the nuſance. Or where a bookſeller or printer's ſervant ſells a libel in his ſhop, that will charge the maſter for the libel. In all caſes where a perſon engages to do a thing for a reward the law implies an engagement to do it with reaſonable care and diligence; and it is contradictory to the very nature of the engagement and the policy of the law to introduce ſuch an exception as in this caſe. At all events however the loſs in this caſe is out of the terms of the notice; for it did not happen from the want of care of the maſter or crew, but from the perſonal default of the carrier himſelf in not having provided a ſufficient veſſel, which it was his duty to have done: and there is no ſtipulation againſt his own perſonal wrong. And he referred to *Ellis* v. *Turner* (*a*), where a ſimilar notice was given, and

(*a*) 8 *Term Rep.* 531.

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yet the owner of the veſſel was holden liable for the whole loſs upon the ſpecial undertaking of the maſter.

Gaſelee, for the defendant, ſaid, that he was reſtrained by the order of niſi prius from diſputing that the defendant was liable to the extent of 10 per cent. otherwiſe he ſhould have contended that he was not liable at all. He admitted that in the abſence of any expreſs contract the law implies a contract that the carrier ſhall be liable for all loſſes, except ſuch as ariſe from the act of God or the king's enemies; but inſiſted that he might make a ſpecial acceptance, on which only he would then be liable. For expreſſum facit ceſſare tacitum, and the law never raiſes an implied contract againſt an expreſs one; as in *Touſſaint* v. *Martinnant* (*a*). The dictum of Lord *Holt* in *Lane* v. *Cotton* may indeed be oppoſed to this, but that ſtands unſupported, and is contrary to the principle of the modern deciſions eſtabliſhing the ſpecial acceptance of carriers in certain caſes, as well as of ſome more ancient authorities. *Kenrig* v. *Eggleſton* (*b*); *Tyly* v. *Morrice* (*c*); *Titchburne* v. *White* (*d*); *Gibbon* v. *Paynton* (*e*); *Clay* v. *Willan* (*f*); *Yate* v. *Willan* (*g*); and *Izett* v. *Mountain* (*h*). The dictum of Lord *Kenyon* in *Hide* v. *The Trent and Merſey Navigation* (*i*) does not go the length of ſaying that a common carrier cannot accept goods upon a ſpecial contract, but only that he cannot diſcharge himſelf by *his own* act, as by giving general notice. And it is no anſwer to the 5*l.* caſes to ſay, that they pro-

(*a*) 2 *Term Rep.* 100. (*b*) *All.* 93. (*c*) *Carth.* 485.
(*d*) 1 *Stra.* 145. (*e*) 4 *Burr.* 2298. (*f*) 1 *H. Blac.* 298.
(*g*) 2 *Eaſt*, 128.
(*h*) 4 *Eaſt*, 371. The account of the caſe of *Smith* v. *Shepherd*, *Abbott's Law of Merchant Shipping*, 232. was alſo referred to.
(*i*) 1 *Eſp. N. P. Caſ.* 36.

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ceeded on an undertaking of the owner, expreſs or implied, that the parcel was not worth more than 5*l.*; for it is now ſettled that he ſhall not recover even the 5*l.* in caſe of ſuch a ſpecial acceptance, if the parcel be of greater value. Taking the whole of the notice together, it appears that ſo far from the carrier declining the reſponſibility of the law, he was even willing to take more onus upon him, and indemnify the owner againſt even the acts of God and the king's enemies for a *proportionable* reward. Then it muſt be inferred that the ſpecial riſks, for which only the carrier contracted in the firſt part of the notice, were for leſs than a reaſonable reward; and if ſo, there would be a ſufficient conſideration to the plaintiff for the defendant narrowing his common law liability. As to this not being a caſe within the terms of the notice, becauſe it is the owner's duty to provide a proper veſſel; that does not follow; becauſe the want of repair may be as much the default of the maſter as of the owner. Beſides the notice is that the owner will not be liable for *any* loſs unleſs occaſioned by the want of ordinary care in the maſter or crew, which excludes every other cauſe of loſs. Then it was not competent to the ſervant beyond the declared ſcope of his authority, as limited by the notice, to bind the owner of the veſſel by a promiſe which went to warrant the ſecurity of the veſſel at all events; however the owner himſelf might have bound himſelf by ſuch a promiſe: and therefore this is not like *Ellis* v. *Turner*, where the ſpecial promiſe of the maſter was collateral to the notice, namely, to deliver the goods at a particular place in the courſe of the navigation. [Lord *Ellenborough* C. J. Is it not within the ſcope of the ſervant's general authority to declare in what condition the veſſel is, which may be the plaintiff's

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inducement to put his goods on board it?] If the ſervant make a fraudulent repreſentation he himſelf would be liable, and might perhaps, in ſome caſes, bind his employer for whoſe benefit he was acting, but the remedy would be in another form of action. [*Lawrence* J. If the ſervant have authority to repreſent the veſſel in good condition, why may not that be the foundation of an aſſumpſit as well as if the maſter himſelf had ſo repreſented it?] It would be ſo if he had a general authority, according to *Seignior* v. *Wolmer* (*a*); but here was only a ſpecial authority to contract within the terms of the notice, and therefore an execution of it under a different modification will not bind the principal, as in *Fenn* v. *Harriſon* (*b*). If then the plaintiff muſt be bound by the notice, this action is miſconceived; becauſe the defendant did not contract as a common carrier, but ſpecially with the reſtriction contained in the notice; and if he were bound to have accepted the goods in his general character, he having refuſed to do ſo, the plaintiff's remedy ſhould have been by an action on the caſe againſt him for ſuch refuſal.

Holroyd, in reply, noticed the ſtatutes 7 *Geo.* 2. *c.* 15. and 26 *Geo.* 3. *c.* 86. which particularly exempted the owners of ſhips from loſſes of gold, ſilver, and jewels, put on board without their privity, beyond the value of ſhip and freight, and that on certain conditions: which ſhews that they were before conſidered as liable. And ſaid that the 5*l.* caſes certainly went on the ground of want of adequate conſideration for the riſk: and it was a ſufficient reaſon why the carrier was not liable even to that amount, becauſe if he had had notice that the value of the goods

(*a*) *Godb.* 360. (*b*) 3 *Term Rep.* 757. Sed vi. S. C. 4 *Term Rep.* 177.

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was more, he might have taken additional precautions againſt the loſs. That as to the form of the action, it was ſettled in *Dale* v. *Hall* (*a*) that it made no difference whether it were in aſſumpſit or on the cuſtom of the realm; for that by ſtating that the defendant carried for hire, it ſhewed that he was a common carrier, and that was a foundation for the aſſumpſit.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. delivered judgment. The general queſtion ſubmitted to our determination by the ſpecial caſe ſtated at niſi prius is, whether the plaintiffs be intitled to more than 10*l.* per cent. upon the ſum of 274*l.* 16*s.* 4*d.* the damages ſtated to have been ſuſtained by the plaintiffs in conſequence of the injury done to their yarn while on board the defendant's lighter. That they are entitled to recover to the extent of 10*l.* per cent. is admitted by the terms of the queſtion. On the part of the plaintiffs it has been argued, either that the notice given by the defendant, as ſet forth in the caſe, is illegal, being to exempt him from a reſponſibility caſt on him *by law* as a carrier of goods by water for hire; or if that propoſition be not maintainable, that in fact the preſent caſe does not fall within the terms and meaning of that notice. At the cloſe of the argument the Court intimated an opinion that in the determination of this caſe it might perhaps not be neceſſary to enter into a conſideration of the general queſtion, as to the validity of theſe notices in point of law, and to what extent and upon what principles they may be ſupportable. And on further conſideration we are all of opinion, that in the preſent caſe, admitting the notice given by the defendant

(*a*) 1 *Wil.* 281.

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and the other owners of veſſels to be valid as an agreement between them and the ſhippers of goods, the circumſtances ſtated do not bring the plaintiff's loſs within ſuch agreement. In every contract for the carriage of goods between a perſon holding himſelf forth as the owner of a lighter or veſſel ready to carry goods for hire, and the perſon putting goods on board or employing his veſſel or lighter for that purpoſe, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his veſſel is tight and fit for the purpoſe or employment for which he offers and holds it forth to the public: it is the very foundation and immediate ſubſtratum of the contract that it is ſo: the law preſumes a promiſe to that effect on the part of the carrier without any actual proof; and every reaſon of ſound policy and public convenience requires it ſhould be ſo. The declaration here ſtates ſuch promiſe to have been made by the defendant; and it is proved by proving the nature of his employment; or, in other words, *the law* in ſuch caſe without proof *implies* it. The declaration avers a breach that the lighter was *not tight and capable* of carrying the yarn ſafely; and the facts ſtated ſupport the breach ſo alleged, by ſhewing that the veſſel was leaky and had nearly ſunk in the dock before the yarn could be unloaded from the lighter into the ſloop. This we conſider as perſonal neglect of the *owner*, or more properly as a non-performance on *his* part of what he had undertaken to do, viz. to provide a fit veſſel for the purpoſe. This brings me to conſider the terms of the notice: "We will "not be anſwerable for any loſs or damage which ſhall "happen to any cargo which ſhall be put on board any "of our veſſels, unleſs ſuch loſs or damage ſhall happen "or be occaſioned by want of ordinary care and diligence

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"in the maſter or crew of the veſſel, in which caſe we "will pay 10*l.* per cent. upon ſuch loſs or damage, ſo "as the whole amount of ſuch payment ſhall not exceed "the value of the veſſel and the freight." I have before ſtated our opinion to be that this is clearly a neglect or breach of performance in the *owner* of the veſſel, and not a neglect in the *maſter* or *crew*; it does not therefore come within the exception of ſuch loſs or damage as is to be compenſated by 10*l.* per cent. But the notice ſtates that "they will not be anſwerable for any *other* loſs or damage;" and therefore this muſt be contended to be within that *other loſs or damage* for which they will not be anſwerable; a propoſition however which ſeems to have ſtruck the counſel for the defendant as not capable of being ſupported; for I take him to have admitted in his argument that if the *defendant* had *himſelf* made the promiſe ſtated in the declaration he would have been liable; and he could not contend otherwiſe: for it is impoſſible without outraging common ſenſe ſo to conſtrue this notice as to make the owners of veſſels ſay, We will be anſwerable to the extent of 10 per cent. for any loſs occaſioned by the want of care of the *maſter* or *crew*, but we will not be anſwerable at all for any loſs occaſioned by *our own miſconduct*, be it ever ſo groſs and injurious; for this would in effect be ſaying, We will be at liberty to receive your goods on board a veſſel, however leaky, however unfit and incapable of carrying them; we will not be bound even to provide a crew equal to the navigation of her; and if through theſe defaults on our part ſhe be loſt, we will pay nothing. Nay more, your compenſation in caſe of miſconduct of the maſter or crew can never exceed the value of the veſſel and her freight; and therefore by providing a rotten and leaky

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veſſel of little value we leſſen our own reſponſibility pro tanto even in the only event in which we are to be at all reſponſible. Ridiculous as this ſuppoſed ſtate of the agreement muſt appear, yet theſe and more abſurd ſtipulations muſt be introduced into it if we give it a conſtruction which ſhall bring this caſe within it. Indeed that this is the true conſtruction will further appear from the part of the notice reſpecting *additional freight*; for it is addreſſed to thoſe who are deſirous of having their goods carried free of riſk "from the act of God or otherwiſe;" words importing that the thing for which an increaſed freight is to be paid, is that which is properly the object of riſk, and of courſe may or may not happen to the goods, *i. e.* that which may ariſe from accident and depends on chance, and not that which is certain and muſt inevitably be the conſequence of a defect in that which the carrier has engaged to provide. Every agreement muſt be conſtrued with reference to the ſubject matter; and looking at the parties to this *agreement* (for ſo I denominate *the notice*), and the ſituation in which they ſtood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters was to limit their reſponſibility in thoſe caſes only where *the law* would otherwiſe have made them anſwer for the neglect of *others*, and for *accidents* which it might not be within the ſcope of ordinary care and caution to provide againſt. For theſe reaſons, we are of opinion that the plaintiffs are entitled to have their verdict entered for the full ſum of 274*l.* 16*s.* 4*d.* and that the poſtea be delivered to them for that purpoſe.

Poſtea to the plaintiff.

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Wednesday, June 20th.

WIGLEY *againſt* JONES, Marſhal of the Marſhalſea.

In an action againſt the marſhal for an eſcape, it being alleged in the declaration that the priſoner was arreſted on meſne proceſs and brought before a Judge at chambers by virtue of a *writ of habeas corpus*, and was by him thereupon *committed* to the cuſtody of the marſhal *as by the record thereof now remaining in the Court of B. R.* appears, &c. ſuch allegation is either impertinent and ſurpluſage; for, properly ſpeaking, ſuch documents are not *records* nor capable of becoming ſo: or, conſidering them as *quaſi of record*, the allegation is ſufficiently proved by the production of them from the office of the clerk of the papers of the K. B. priſon, with whom they are properly depoſited.

IN an action againſt the marſhal of *B. R.* for an eſcape the declaration ſtated that one *Mary Bergeret de Frouville* was indebted to the plaintiff in 34*l.* 9*s.* for goods ſold and delivered, for the recovery of which the plaintiff in *Trinity* term 41 *Geo.* 3. ſued out of *B. R.* a bill of *Middleſex* to arreſt her, founded on an affidavit of debt for 34*l.* 9*s.* filed of record in *B. R.*, and which precept was indorſed for bail for the ſaid ſum. By virtue of which ſaid precept the ſaid *M. B. de F.* on the 23d of *September*, &c. was arreſted by the ſheriff of *Middleſex*, and detained in cuſtody for want of bail; and being in ſuch cuſtody for the cauſe aforeſaid, on the 24th of the ſame *September* ſhe was brought before Sir *S. Le Blanc*, one of the Juſtices of *B. R.* at his chambers, &c. in the cuſtody of the ſaid ſheriff by virtue of a writ of *habeas corpus* iſſued out of *B. R.* and directed to the ſheriff, &c. and the ſaid *M. B. de F.* was thereupon *committed* by the ſaid Judge to the cuſtody of the marſhal of the Marſhalſea, &c. at the ſuit of the plaintiff in the plea aforeſaid, and for the cauſe aforeſaid, there to remain until, &c. *as by the record thereof now remaining in the court of our ſaid lord the king before the king himſelf manifeſtly appears*, by which commitment the defendant, then marſhal, &c. took the ſaid *M. B. de F.* into his cuſtody, &c. in the King's Bench priſon. The declaration then alleged the ſubſequent eſcape of the priſoner, while the debt remained unſatisfied, to the damage of the plaintiff, &c. Plea not guilty.

The only queſtion at the trial was, Whether the averment of the writ of habeas corpus and the commitment thereon

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thereon *appearing of record* were proved? the only proof being the production of the original writ itſelf (*a*) with the committitur annexed, which were produced by the clerk of the papers of the King's Bench priſon, with whom, as the ſervant of the marſhal, ſuch documents are and have been for a conſiderable period paſt depoſited. It was objected on the part of the defendant that theſe documents were not *records*, and that nothing elſe would ſatisfy the averment than ſhewing that they had been duly recorded *in court*, which could only appear by the production of ſuch a record filed in the court, or an examined copy of it. And the caſe of *Turner* v. *Eyles* (*b*) was relied on as in point, where the Court held that evidence like the preſent was not ſufficient to ſuſtain ſuch an allegation; but that there ought to have been an examined copy of the record of commitment as recorded in court. Lord *Ellenborough* C. J., before whom the cauſe was tried at the Sittings at *Weſtminſter* after *Michaelmas* term laſt, ſuffered a verdict to be taken for the plaintiff, but reſerved the point, and gave the defendant's counſel leave to move to ſet aſide the verdict and enter a nonſuit

(*a*) The habeas corpus in this caſe was directed to the ſheriff of *Middleſex*, commanding him to have the body of *Mary Bergeret de Frouville* detained in priſon under his cuſtody under ſafe and ſecure conduct, together with the day and cauſe of her being taken and detained before Lord *Kenyon* C. J. at his chambers in Serjeants' Inn, *Chancery-lane*, *London*, immediately after the receipt of this writ, to do and receive all ſuch things which the Ch. J. ſhould then and there conſider of her in this behalf. Dated 25th of *June*, 41 *G.* 3.

The return of the ſheriff ſtated that the priſoner was taken and detained by him by virtue of ſeveral bills of *Middleſex*, amongſt others, at the ſuit of *Wigley*. On which was indorſed as follows; "*Mary B. de F.* is this 24th "of *September* 1801 committed to the cuſtody of the marſhal, &c. for want "of bail, with the cauſes within mentioned, by *S. Le Blanc.*"

(*b*) 3 *Boſ. & Pull.* 456. and alſo from a MS. note of the ſame caſe which was read on moving for the rule.

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if the Court ſhould be of opinion that the objection was well founded.

Such a motion was accordingly made and a rule niſi granted laſt term, which was ſupported by *Erſkine*, *Garrow*, and *Wood*; who, in addition to *Turner* v. *Eyles*, referred to *Wightman* v. *Mullens* (*a*): and it was oppoſed by *Gibbs* and *Marryat*, who diſtinguiſhed this from the other caſes, becauſe they were commitments in execution, and this was a commitment on meſne proceſs, which either was no record at all, at leaſt while continuing in the hands of the officer; in which caſe the allegation was impertinent and to be rejected as ſurpluſage; or if it were a record, the allegation was well proved by producing the original itſelf out of the hands of the officer of the court who had the proper cuſtody of it. *The Court* ſaid that the queſtion being of general conſequence they would look further into it before they gave their opinion. And now

Lord ELLENBOROUGH, C. J. delivered judgment.

This was a motion for a new trial in an action brought againſt the marſhal of the King's Bench priſon for an eſcape on meſne proceſs. The declaration alleged that one *Mary Bergeret de Frouville*, being brought before Sir *S. Le Blanc*, Knt. by virtue of an habeas corpus, was by him thereupon committed to the cuſtody of the marſhal at the ſuit of the plaintiff, "as by the *record* thereof now "remaining in the court of our ſaid lord the now king "before the king himſelf manifeſtly appears." In proof of this commitment of the defendant in that action, verified as alleged to be by *record* thereof, the plaintiff pro-

(*a*) 2 *Stra.* 1226. and vide alſo *Unwin* v. *Kirchoffe*, *ib.* 1215. and *Pearſon* v. *Rawlins*, 1 *Eaſt*, 405. as to commitments *in execution* which are entered of record.

duced

duced in evidence the actual *writ of habeas corpus* with the *committitur* of Mr. Juſtice *Le Blanc* indorſed thereon, *from the office of the clerk of the papers* in the *King's Bench priſon*. It was objected on the part of the defendant that the writ of *habeas corpus*, with, the *committitur* entered thereon, having all along remained in the hands of the officer, and in the place above mentioned, as it appeared to have done, and not having been *filed of record* in the court of King's Bench at *Weſtminſter*, was not *a record* of this court within any proper ſenſe of that word; and that therefore the plaintiff, who had in his declaration alleged it ſo to be, had failed in proving it, and ought on that account to be nonſuited. It appeared to me, from all the account I could obtain at the trial of the depoſit and cuſtody of theſe writs, that they were never kept in any other manner than this was, and that they were never in fact filed or depoſited amongſt the records of the court in the Treaſury-chamber at *Weſtminſter*, or elſewhere; and that therefore the allegation in queſtion was either ſurpluſage, the writ and committitur thereon never being entered *of record* at all; or that the depoſiting and keeping thereof in the uſual place of cuſtody for that purpoſe was ſufficient to maintain the allegation of its remaining *of record*. As, however, it was ſtated to me that there had been a late caſe of *Turner* v. *Eyles* decided in the Common Pleas, on the ſame ſubject, in which that court had holden that as the party had alleged the exiſtence of ſuch a record he was bound to prove it, the jury under my direction found a verdict for the plaintiff, (which was for 1*s*. only,) and I gave leave to the defendant to move to enter a nonſuit, if the Court ſhould be of opinion that other proof was neceſſary upon this head. Since the argument upon the motion for a new trial we have cauſed the moſt diligent inquiry to be made

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made as to the exiſtence of any records of this kind, and we do not find that any ſuch writs of habeas corpus, with committiturs thereon, have ever been returned to, or filed, or kept by the court or any of its officers, at *Weſtminſter* or elſewhere, except in the place, and by the officer, above-mentioned; but that the ſame have always remained, as any other warrant naturally would, in the hands of the officer to whom it is immediately directed, and whoſe voucher or authority for the act of detaining the party it properly is. Nor, by analogy to the caſe of any ſimilar writs, do we think that they are properly capable of being entered on *record*, either by themſelves or as part of any other record or proceeding. In the caſe of a commitment on a writ of habeas corpus, where the party had been taken upon *a writ of execution*, and which was the caſe in *Turner* v. *Eyles*, 3 *Boſ. & Pull.* 456., it might poſſibly be otherwiſe; and ſuch habeas corpus and commitment thereon might be noticed in the ſheriff's return to the writ of execution filed of record. But that is not the preſent caſe. As, therefore, the writ and committitur neither *are* of *record*, nor are properly *capable* of being ſo, the allegation reſpecting them, as *remaining of record*, is either an impertinent allegation, and may be rejected as ſurpluſage, and requiring no proof, or as at any rate requiring no other proof than it has received, by the production of the writ and return, which are *quaſi of record*; as the *Jamaica* judgment in the caſe of *Walker* v. *Witter*, in *Doug.* 1. was holden to be within the meaning of the words "*of record*" in that caſe, as applied to the ſubject-matter.

Rule diſcharged.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED 1804.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Forty-fifth Year of the Reign of GEORGE III.

In the laſt vacation VICARY GIBBS, Eſq. one of his Majeſty's counſel learned in the law, and Attorney-General to His Royal Highneſs the Prince of WALES, was made Chief Juſtice of CHESTER;

AND

SAMUEL COMPTON COX, Eſq., JOHN S. HARVEY, Eſq., and JAMES STANLEY, Eſq., Barriſters at Law, were appointed Maſters in Chancery.

JONES *againſt* VAUGHAN and HALL.

Thurſday, Nov 8th.

A conſtable executing the warrant of a juſtice of peace, and ſued in treſpaſs, without the magiſtrate, is within the protection of the ſtat 24 Geo. 2. c. 44. ſ 6, and entitled to a verdict on proof of ſuch warrant, having firſt complied with the plaintiff's demand of a peruſal and copy of the warrant before the action brought, though not within *ſix* days after ſuch demand, as the act directs.

IN treſpaſs for breaking and entering the plaintiff's dwelling-houſe and taking his dogs, the defendants pleaded the general iſſue, and alſo juſtified the treſ-

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paſs, the one as conſtable and the other in his aid, under the warrant of a magiſtrate to the conſtable to ſearch the houſe and take the dogs, granted on information that the plaintiff, not being qualified, kept the dogs there for the purpoſe of killing game, &c. Replication de injuriâ, &c. At the trial before *Lawrence* J. at the laſt *Hereford* aſſizes, the fact of the treſpaſs being proved to have happened in *January* laſt, and that the plaintiff on the 17th of *May* ſerved a notice in writing on the defendants, in purſuance of the ſtat. 24 *Geo.* 2. *c.* 44. *ſ.* 6. demanding a peruſal and copy of the warrant under which they acted, which demand was not complied with till the 25th of the ſame month, when the peruſal and copy were given; it was objected on the part of the plaintiff, that the defendants were not entitled to a verdict under the ſtatute (*a*), becauſe the demand was not complied with *within ſix days* afterwards, according to the requiſition of the ſtatute, which put them out of the protection of it. But the learned Judge was of opinion, that however the action might have been well proſecuted againſt theſe defendants if it had been commenced *after* the expira-

(*a*) By *ſ.* 6. it is enacted, "That no action ſhall be brought againſt any "conſtable, &c for any thing done in obedience to any warrant of any juſtice "of the peace until demand made, &c. by the party intending to bring ſuch "action, in writing, of the peruſal and copy of ſuch warrant, and the ſame "hath been refuſed or neglected for ſix days after ſuch demand. And in "caſe, after ſuch demand and compliance therewith, by ſhewing the ſaid "warrant to and permitting a copy to be taken thereof by the party de-"manding the ſame, any action ſhall be brought againſt ſuch conſtable, &c. "for any ſuch cauſe as aforeſaid, without making the juſtice who ſigned or "ſealed the ſaid warrant defendant, that on producing or proving ſuch war-"rant at the trial of ſuch action, the jury ſhall give their verdict for the "defendant, &c. And if ſuch action be brought jointly againſt ſuch juſ-"tice and alſo againſt ſuch conſtable, &c. then, on proof of ſuch warrant, "the jury ſhall find for ſuch conſtable," &c.

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tion of the ſix days, and *before* compliance with the demand of the peruſal and copy of the warrant, yet not having been commenced till after ſuch compliance, the magiſtrate ought to have been made defendant; and that theſe defendants were entitled to a verdict; which was taken for them accordingly.

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Jervis now moved for a new trial, on the ground that the ſtatute was imperative on the officer executing the warrant of a magiſtrate to comply with the demand of a peruſal and copy of it within the ſix days, otherwiſe he forfeited the protection of it, and could not reſtore himſelf to his privilege by a ſubſequent compliance with the demand. That this appeared plainly to be the meaning of the firſt part of the clauſe: and was confirmed by the ſubſequent part which ſays, that "in caſe after *ſuch* demand and compliance therewith" any action ſhall be brought without making the juſtice defendant, the officer on proof of the warrant ſhall be entitled to a verdict. For the word *ſuch* has reference to the period of compliance before mentioned as well as to the demand. And the latter part was merely added to ſupply the omiſſion in the former in not ſtating *by whom* the copy of the warrant was to be taken, which is there required to be done by the party demanding the ſame. That if the officer could indemnify himſelf at any time after the ſix days, by giving ſuch peruſal and copy of the warrant, he might be induced to withhold them to a period ſo late as to exclude the injured party from the benefit of his compliance; for by a former clauſe in the act, (*ſ.* 1.) the magiſtrate, who is to be ſubſtituted as a defendant in lieu of the officer, cannot be ſued without one calendar month's previous notice in writing: and by another clauſe, (*ſ.* 8.) the ac-

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tion muſt be brought within ſix calendar months after the act committed.

Lord ELLENBOROUGH C. J. It appears to me that the conſtruction put on the act by my brother *Lawrence* at the trial is the proper one. I do not think that the word *ſuch* is neceſſarily to be referred to the time which is given to the officer to comply with the demand, but that it meant only to refer to "ſuch *demand*" (the word with which it is joined) as was before mentioned, namely, *of the peruſal and copy of the warrant*; which conſtruction will beſt ſatisfy the object of the act.

GROSE J. declared himſelf of the ſame opinion.

LAWRENCE J. The object of the clauſe in queſtion was the protection of thoſe officers who are charged with the execution of magiſtrates' warrants, who before that time were ſubject to indictment if they did not execute the warrants directed to them, or to vexatious actions if they did. For this purpoſe the Legiſlature propoſed to ſubſtitute the magiſtrate by whom the warrant was granted, and who was ſuppoſed to be cognizant of the legality of it, in lieu of the officer who was merely the inſtrument to execute it, and who was probably ignorant of the grounds on which it iſſued. It therefore has given the officer a period of ſix days after demand of his authority for the production of it, within which time if he comply with the demand he ſecures his indemnity. But if he delay after that time, he ſubjects himſelf to be ſued as any other perſon, and it is then his own fault if the party ſue him before he has complied with the demand. But neither the words nor the intent of the act exclude

his protection unleſs he comply within the ſix days, provided the party do not ſue him in the interval, after the ſix days, and before ſuch his compliance. And this conſtruction will, I think, beſt inſure the object of the Legiſlature.

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LE BLANC J. It muſt be the party's own fault if he delay demanding a copy of the warrant till it be too late to ſue the magiſtrate. And if the demand be made in time, and the officer, to protect whom was the principal object of the clauſe in queſtion, delay to comply with it, after the ſix days allowed him by the ſtatute, he acts at his peril till he do comply, and ſubjects himſelf in the interval to be ſued as any common perſon.

Rule refuſed.

HUNT *againſt* SILK.

Friday, Nov. 9th.

IN aſſumpſit for money had and received, the facts appeared at the trial before Lord *Ellenborough* C. J. at the laſt ſittings at *Weſtminſter* to be theſe. On the 31ſt of *Auguſt* 1802 an agreement of that date was made between the parties, whereby the defendant, in conſideration of 10*l.* *to be paid at the time of executing the leaſe* after mentioned, and for other conſiderations therein ſtated, agreed that *within ten days* from the date thereof he would grant to the plaintiff a leaſe of a certain dwelling-houſe for nineteen years (determinable by the plaintiff in 5, 10,

A. agreed, in conſideration of 10*l.* to let a houſe to *B.*, which *A.* was to repair and execute a leaſe of *within ten days*, but *B.* was to have immediate poſſeſſion, and in conſideration of the aforeſaid was to execute a counterpart and pay the rent. *B.* took poſſeſſion and paid the 10*l.* immediately, but *A.* neglected to execute the leaſe and make the repairs beyond the period of the ten days, notwithſtanding which *B.* ſtill continued in poſſeſſion: held that *B.* could not, by quitting the houſe *for the default of* A., reſcind the contract and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the ſpecial contract; for a contract cannot be reſcinded by one party for the default of the other, unleſs both can be put in ſtatu quo as before the contract: and here *B.* had had an intermediate poſſeſſion of the premiſes under the agreement.

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or 15 years) from the 29th of *September* then next, (but poſſeſſion to be immediately given to the plaintiff,) at the yearly rent of 63*l.* And the defendant alſo agreed at his own expence to make certain alterations in the premiſes, and that the premiſes, fixtures, and things ſhould *at the time of executing the leaſe* be put in complete repair. And the plaintiff, *in conſideration of the aforeſaid*, agreed to accept the leaſe at the rent and in manner aforeſaid, and to execute a counter-part, and pay the rent. The plaintiff took immediate poſſeſſion of the premiſes under the agreement, and paid the 10*l.* at the ſame time in confidence that the alterations and repairs ſtipulated for would be done within the ten days; but that period and ſome days after having elapſed, and nothing being done, notwithſtanding ſeveral applications to the defendant to perform the work, the plaintiff quitted the houſe, giving the defendant notice of his having reſcinded the agreement in conſequence of the defendant's default, and brought this action to recover back the money he had paid. Lord *Ellenborough* however thought that the plaintiff was too late to reſcind the contract, and that his only remedy was on the ſpecial agreement, and therefore directed a nonſuit. Which

Reader now moved to ſet aſide, and to have a new trial, on the authority of *Giles* v. *Edwards* (*a*), where the defendant agreed to ſell to the plaintiff all his cord wood then growing at 11*s.* 6*d.* per cord ready cut, which the plaintiff was to pay for in *March* 1792, and the defendant was to cut, cord, and clear from off the premiſes by *Michaelmas* following. And the cuſtom of the country was for the ſeller to cut off the boughs and trunks, and

(*a*) 7 *Term Rep.* 181.

cord

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cord the wood, and for the buyer to record it, after which it became his property. In *March* 1792 the plaintiff paid 20 guineas on account; and the defendant having corded only ten out of ſixty cords which were cut (half a cord of which the plaintiff had recorded, and meaſured the reſt), and neglecting to cord the remainder of the wood, the plaintiff gave notice of reſcinding the contract, and brought an action for money had and received to recover back what had been paid. The ſame objection was there made as is now inſiſted on; but *Lawrence* J. before whom it was tried overruled it, on the ground that as it was the defendant's own fault that the contract which was entire was not executed, the plaintiff might recover back the money he had paid, the conſideration having failed. And this direction was approved by the Court, upon a motion for a new trial. So here the contract was entire: the 10*l.* was to be paid in conſideration of the repairs being done, and the plaintiff was not bound to have paid it before; nor could the defendant have ſued him for it without averring performance on his part. But the plaintiff, having paid it upon the faith of the agreement which has not been performed by the defendant, has paid it in his own wrong and without conſideration. The former caſe is even ſtronger than this; for there was a partial performance of the contract by both parties, whereas here the defendant has done nothing towards the execution of it. And again, in that caſe the money was paid in purſuance of the terms of the contract, and ſo far confirmed it, whereas here the plaintiff was not bound by the contract to have paid any thing, and therefore the payment was no affirmation of it, but was made merely upon the confidence that it would be performed, a conſideration which has wholly failed.

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Lord ELLENBOROUGH C. J. Without queſtioning the authority of the caſe cited, which I admit to have been properly decided, there is this difference between that and the preſent; that there by the terms of the agreement the money was to be paid antecedent to the cording and delivery of the wood, and here it was not to be paid till the repairs were done and the leaſe executed. The plaintiff there had no opportunity by the terms of the contract of making his ſtand to ſee whether the agreement were performed by the other party before he paid his money, which the plaintiff in this caſe had: but inſtead of making his ſtand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waved his right, and voluntarily paid the money; giving the defendant credit for his future performance of the contract; and afterwards continued in poſſeſſion notwithſtanding the defendant's default. Now where a contract is to be reſcinded at all, it muſt be reſcinded in toto, and the parties put in ſtatu quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being reſcinded. If the plaintiff might occupy the premiſes two days beyond the time when the repairs were to have been done and the leaſe executed, and yet reſcind the contract, why might he not reſcind it after a twelvemonth on the ſame account. This objection cannot be gotten rid of: the parties cannot be put in ſtatu quo.

GROSE J. of the ſame opinion.

LAWRENCE J. In the caſe referred to, where the contract was reſcinded, both parties were put in the ſame ſituation they were in before. For the defendant muſt at any

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any rate have corded his wood before it was ſold. But that cannot be done here where the plaintiff has had an intermediate occupation of the premiſes under the agreement. If indeed the 10*l.* had been paid ſpecifically for the repairs, and they had not been done within the time ſpecified, on which the plaintiff had thrown up the premiſes, there might have been ſome ground for the plaintiff's argument that the conſideration had wholly failed: but the money was paid generally on the agreement, and the plaintiff continued in poſſeſſion after the ten days, which can only be referred to the agreement.

LE BLANC J. The plaintiff voluntarily conſented to go on upon the contract after the defendant had made the default of which he now wiſhes to avail himſelf in deſtruction of the contract. But the parties cannot be put in the ſame ſituation they were in, becauſe the plaintiff has had an occupation of the premiſes under the agreement.

Rule refuſed.

The KING *againſt* The Inhabitants of ABERAVON.

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Where a corporation was ſeiſed in fee of certain unincloſed lands, which were ſtocked with the cattle of the reſident burgeſſes, or the widows of ſuch, who alone were permitted by the burgeſſes to claim ſuch right, and alſo by poor pariſhioners, who were admitted to ſuch enjoyment from charity; and ſuch lands were altogether omitted out of the poor rate; the Seſſions on appeal by one who had given notice of his objection to the pariſh officers, and to the corporation as the party intereſted under the ſtat. 41 *Geo.* 3. *c.* 23. *ſ.* 6. having *quaſhed* the rate, this Court confirmed that order.

D. *Jones* appealed to the Quarter Seſſions of *Glamorganſhire* againſt a poor rate, made for the pariſh of *Aberavon* in that county, and the Seſſions quaſhed the rate, ſubject to the opinion of this Court on the following caſe.

The

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The pariſh, town, and borough of *Aberavon* in the county of *Glamorgan* are co-extenſive, and have church-wardens and overſeers appointed in the common way. The portreeve, aldermen, and burgeſſes, ſome of which latter reſide in the borough and pariſh, ſome in the neighbourhood, and others at a diſtance, are ſeiſed in fee in their corporate capacity of certain incloſed lands, to the amount of acres, and they are alſo in like manner ſeiſed of 2 or 300 acres of unincloſed marſh lands, called *Aberavon Marſh*, worth 10*s.* an acre, and of about 100 acres of mountain, worth 5*s.* an acre. The incloſed land is annually parcelled out between the reſident burgeſſes, who occupy the ſame as tenants, paying to the corporation certain rents according to the ſize and value. Theſe incloſed lands are charged in the rate to the burgeſſes, the renters, as occupiers, in proportion to their ſeveral rents, and as ſuch thoſe burgeſſes pay the poor rates, and alſo the land-tax, to which the incloſed lands are alſo rated. In the poor rate the incloſed lands are charged under the title of "*The Burgeſſes land*," (which covers the three columns in the other part of the rate reſerved for *landlords*, *tenements*, and *occupiers*,) adding the perſon's name from whom the rate is collected, and the valuation of his occupation, and the ſum to be collected. The corporation have not any live ſtock by which they can occupy, nor any perſonal chattels, except their maces and halberts. The unincloſed marſh and mountain have never been charged to either land-tax or poor rate. They are occupied as common land by the individual burgeſſes or their widows who are reſidents, and keep ſtock to occupy; but thoſe burgeſſes who have not any ſtock, or are non-reſident, do not receive any benefit from the ſame. The burgeſſes do not permit any perſon but burgeſſes or their widows to claim

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claim a right of paſturage on theſe unincloſed lands, but they ſuffer by way of charity and in eaſe of the pariſh ſome poor perſons who are reſidents, not being burgeſſes, to depaſture there. Of thoſe who depaſture every perſon occupies according to the quantity of his ſtock, ſo that one occupier may have 18 head of cattle and 100 ſheep, there being no limitation, and another not more than one cow, or one horſe, or even one ſheep. In the poor rate in queſtion the unincloſed marſh and mountain lands are as uſual left out. And *D. Jones* gave notice of appeal againſt the rate to the churchwardens and overſeers of the poor of the pariſh, and alſo to the portreeve, aldermen, and burgeſſes of the town and borough of *Aberavon*, ſtating therein, as the ground of objection, that they had omitted to rate the marſh and mountain lands, called *Aberavon Marſhes*, and *Aberavon Mountain*, all which ſaid premiſes were in the poſſeſſion or occupation of the ſaid portreeve, aldermen, and burgeſſes. This notice was admitted to be well ſerved on the churchwardens and overſeers of the poor, and on the portreeve, aldermen, and two of the principal burgeſſes in their corporate capacity; but the majority of the reſident burgeſſes and other perſons who were occupiers of the ſaid unincloſed lands were not ſerved, and a number of out-dwelling burgeſſes within the county and juriſdiction of the court were not ſerved. On the hearing of the appeal the queſtions before the Court were, firſt, whether theſe unincloſed lands ſhould, under the circumſtances of the occupation, be rated at all: ſecondly, whether, if they were rateable, the portreeve, aldermen, and burgeſſes were to be conſidered as occupiers, and to be rated as ſuch, and notice of appeal to them in their corporate capacity to be deemed ſufficient; or whether the ſeveral and reſpective burgeſſes and other perſons who

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who were the actual occupiers were not the perſons to be rated, and that in proportion to their reſpective ſtocks: and if ſuch perſons were to be rated, whether the Court could quaſh or amend the rate without ſuch perſons firſt having notice under the ſtat. of the 41 *Geo.* 3. *c.* 23. *ſ.* 6., which they had not.

Praed Serjt. and *Bevan*, in ſupport of the order of ſeſſions, contended, 1ſt, That the unincloſed lands, producing profit, were clearly rateable (which was not denied). 2dly, That the corporation who were the owners of the fee were properly rated for ſuch land in their corporate capacity, there being no known diſtinct occupation by any other; according to *R.* v. *Gardner* (*a*). The perſons who actually ſtock the land are either the different members of the corporation, who, *as ſuch*, claim the privilege, or the widows of ſuch, who are admitted by the curteſy of the body to participate in their enjoyment, or poor perſons who are ſuffered to turn ſtock there out of charity, and in eaſe of the pariſh, who have never been deemed proper objects of rating. The enjoyment of the common being indiſcriminately by ſuch of the burgeſſes as are reſident and have ſtock cannot conſtitute an occupation diſtinct from that of the corporation in general in right of which they ſo enjoy it: and the value of the individual enjoyment is liable to fluctuate from day to day, and cannot be aſcertained; which differs theſe from the incloſed lands, where the reſpective burgeſſes have individually an excluſive occupation of their ſeveral ſhares, diſtinct from the poſſeſſion of the corporation itſelf. In order to render theſe perſons individually rateable they

(*a*) *Comp.* 79.

muſt

muſt be conſidered as tenants to the corporation; whereas they aſſume to occupy in their own right as members of the corporation, and not as tenants, whether with or without rent. Then as to the poor perſons who are permitted out of charity to turn upon the common, they cannot be conſidered as occupiers who are rateable. [*Lawrence* J. The mere circumſtance of a perſon being permitted to occupy land out of charity is no objection to his being rated in reſpect of ſuch occupation (*a*). Suppoſing the perſons to be tenants at will without rent, they would not therefore be exempt from being rated.] They are not *tenants* at will; they have no intereſt at all in the land, which a tenant at will has till the will is determined. Then taking the corporation to be the occupiers of the common land by means of the actual occupation of their own members generally, and of thoſe perſons who as their ſervants are allowed a gratuitous occupation; the notice required by the ſt. 41 *G.* 3. *c.* 23. *ſ.* 6. to be given to the parties *intereſted*, as well as to the pariſh-officers, where a rate is appealed againſt for the omiſſion of any perſon who ought to be rated, has been complied with. That entitled the appellant to have his appeal heard, and to obtain redreſs; and it was diſcretionary in the Seſſions afterwards whether they would quaſh the rate on account of the magnitude of the omiſſion or the uncertainty of the value to be added to the rate. And at all events, ſuch a primâ facie caſe of occupation by the corporation was proved as called upon them to ſhew a diſtinct occupation in other perſons; according to the doctrine in *Rex* v. *Gardner*. And this is a more reaſonable conſtruction of the act than requiring notice to be given to every individual who may happen to turn a ſingle ſheep upon the

(*a*) Vide *Rex* v. *Munday and Others*, 1 *East*, 584.

common

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common one day and none the next, whoſe numbers it would be ſcarcely poſſible to aſcertain, and ſtill leſs the value of their ſeveral intereſts in order to rate them equally. The corporation is the only body really "intereſted in the event of the appeal," within the fair meaning of the act. But ſuppoſing it were uncertain in whoſe occupation the common lands were, yet the ſubject matter being admitted to be rateable, and not rated, it was ſufficient to warrant the Seſſions in quaſhing the rate to compel the pariſh officers, whoſe proper duty it is, to find out in whoſe occupation the property really was, and make their aſſeſſment accordingly.

Erſkine and *Comyn* contrà. The ſtat. 41 *Geo.* 3. *c.* 23. *ſ.* 6. is peremptory, that any appellant objecting to a rate on account of the omiſſion of any perſon, ſhall give notice to the party intereſted as well as to the pariſh officers, in order to enable ſuch party to come and defend his intereſt, and the appellant is not entitled to be heard without proving ſuch notice. Then every ſuch appellant is bound to know who the perſons are, the omiſſion of whom in the rate he complains of; and if he cannot give reaſonable evidence to ſatisfy the Seſſions that ſuch party ought to have been included, his appeal muſt be diſmiſſed. It is not enough to ſhew that ſome other perſon is omitted to whom he has not given the notice required by the act; becauſe if that perſon were before the Court he might be able to ſatisfy it that the omiſſion was proper; and therefore in a doubtful caſe the notice required would be purpoſely withholden in order the more eaſily to procure the rate to be quaſhed upon ex parte evidence. But upon the caſe ſtated, ſo far from its being ſhewn that the corporation were the occupiers of the common land, that

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their occupation is negatived; for it is ſtated that they had no ſtock wherewith to occupy it, and an actual occupation is ſhewn by others, to whom there was no notice to defend, as required by the ſtatute. It is not enough to ſhew that property yielding profit is omitted in a rate, without ſhewing ſome beneficial occupier who is liable to be rated for it; as in the caſe of *St. Luke*'s hoſpital (*a*). The poor's rate is not a tax upon property, but upon perſons in reſpect of property. And the law does not look to the title, but the actual beneficial occupier. The ſeveral burgeſſes then who turned upon the common have an individual beneficial occupation of it diſtinct from any corporate character, though ſuch benefit may be derived to them through that title. In like manner as the officers of an hoſpital, who have an individual benefit derived to them from their occupation of certain rooms, are rateable in reſpect of that beneficial occupation. The circumſtance of their occupying without payment of rent only proves their occupation to be more beneficial. Beſides, in order to apply the occupation of individual members of the corporation to the corporation itſelf, all the members ought to enjoy the ſame privilege, whereas this is confined to the reſident members. Then again the occupation of the widows of corporators can only be applied to an individual occupation. And the circumſtances of other perſons being permitted to occupy out of charity does not render them leſs liable to be taxed in reſpect of the property which they ſo enjoy.

Lord ELLENBOROUGH C. J. The caſe is very looſely and inaccurately drawn. We ought to have the right of

(*a*) 2 *Burr.* 1053.

enjoy-

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enjoyment more diſtinctly ſtated. It does not appear whether the burgeſſes who turned ſtock on the common did ſo in right of their franchiſe, or by permiſſion of the corporate body. I own I have great difficulty in deciding that a perſon who has a mere permiſſion to turn his cattle on another's land is rateable as an occupier.

GROSE J. The queſtions put at the end of the caſe might be very proper to be conſidered by the Seſſions; but that is not the proper form of drawing up a caſe for the opinion of this court. We can only ſay whether the Seſſions have done legally in quaſhing the rate.

The Court then ſeemed inclined to ſend the caſe back to the Seſſions to be reſtated; but after ſome further conſultation on the bench,

Lord ELLENBOROUGH C. J. ſaid, on further conſideration, I think we may deal with the caſe as it is. Here is a large track of property producing profit which is liable to be rated, and no perſon is in fact rated for it. This property is ſtated to belong to the corporation, and it may be doubtful whether the occupation ſhewn be their occupation or that of individuals. Under theſe circumſtances I cannot ſay that the Seſſions have done wrong in quaſhing the rate. The rate therefore is quaſhed becauſe no perſon has been rated for property which ought to have been rated.

Per curiam. Order of Seſſions confirmed.

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COXETER *againſt* BURKE and Another, Bail of PRICE.

Saturday, Nov. 10th.

THE principal was arreſted on a teſtatum ſpecial capias iſſued out of *London*, where the action was commenced by original, and the venue laid there: and the bail were alſo put in with the filacer for *London*, but they juſtified *in open court at* Weſtminſter. And after judgment by default and a writ of inquiry executed, and final judgment entered, and a writ of capias ad ſatisfaciendum iſſued into *London*, which was returned non eſt inventus, writs of ſcire facias and alias ſcire facias iſſued againſt the bail, and were lodged with the ſheriff of *Middleſex*, and two nihils returned. Whereupon this rule was obtained by

A ſcire facias upon a recognizance of bail taken in open court in *B. R.* is properly ſuable in *Middleſex*, where the record is, though all the previous proceedings which commenced by original were in *London*. And ſemble that it could not be ſued elſewhere than in *Middleſex*.

Garrow and *Lawes*, for ſetting aſide the proceedings againſt the bail for irregularity, becauſe the writs of ſcire facias ought to have been proſecuted in the ſame county in which all the prior proceedings were had, according to *Harris* v. *Calvert and another* (*a*), and where the bail might naturally expect to look for thoſe proceedings, by which it was the intention of the law and practice of the court to give them notice to render their principal.

Humphreys, who ſhewed cauſe againſt the rule, ſaid, that in the caſe referred to the Court conſidered the bail which had been put in improperly in *Middleſex* as a nullity, and therefore that there was nothing to warrant the ſuing out of the ſcire facias in that county; but here the

(*a*) 1 *Eaſt*, 603.

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recognizance of bail was regularly taken in *Middlesex*, and consequently there could be no objection to suing upon it, as upon a record, in the same county. And he cited *Bond* v. *Isaac* (*a*) as in point, that the scire facias must be sued out into *Middlesex* where the recognizance remained, and not into *London* where the original cause of action was. He also insisted that the irregularity, if any, had been waved, because the defendants had appeared to the scire facias since the rule nisi had been obtained. But to this latter ground it was answered, and so ruled by the Court, that the rule having been obtained on the last day of last term, which was no stay of proceedings, the defendants were obliged to appear, and therefore it was no waver. And on the principal point

The Court were clearly of opinion, that the writs of scire facias and alias scire facias were regularly prosecuted in *Middlesex*, where the recognizance of bail was recorded. And

Lord ELLENBOROUGH C. J. referred to *Shuttle* v. *Wood* (*b*) as in point; and added, that it never was doubted but that an action founded on matter of record might be brought

(*a*) 1 *Burr.* 409.

(*b*) *Salk.* 564. 600. 659. 6 *Mod.* 42. and *Holt's Rep.* 612. According to this case the action on the recognizance of bail in *B. R.* can only be brought in *Middlesex*, because it is always entered generally as taken in court, though taken actually by a Judge at chambers; and it is no record till entered. But it is otherwise in *C. B.*: where the recognizance binds as a record from the first caption, and before it is filed at *Westminster*: and therefore where it is taken by a Judge of *C. B.* at Serjeants' Inn, in which case a special entry is made of its being so taken on a day certain, and afterwards it is filed at *Westminster*, a scire facias lies on it either in *London*, where it is so taken, or in *Middlesex*, where it is filed and becomes a record in court. And vide *Hall* v. *Winchfield*, *Hob.* 295. *Pickering* v. *Thomson*, *Barnes*, 207. *Cock* v. *Green*, *Cro. Cooke's Rep.* 31.; and *Kenny* v. *Thornton*, 2 *Blac. R.* 768.

in,

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in the county where the record was filed; and that that was the proper county, though in ſome ſpecial caſes there might be an option between that and ſome other county where the cauſe of action in part aroſe. That here the ſcire facias was properly brought in *Middleſex*, whether the principal action were commenced by original or by bill. And *Lawrence* J. obſerved of the caſe of *Harris* v. *Calvert*, that the only point decided was that the *putting in* of bail in *Middleſex* by miſtake, where all the prior proceedings in the cauſe were in *London*, was a nullity, and therefore did not warrant the ſuing out of the ſcire facias in *Middleſex*.

Rule diſcharged.

WOOLNOTH *againſt* MEADOWS.

Tueſday, Nov. 13th.

IN an action on the caſe for ſlander the plaintiff declared, That whereas he had never been guilty nor ſuſpected of the deteſtable crime of buggery, or of any other ſuch deteſtable crime, or of any attempt or diſpoſition to commit the ſame, &c.; but had obtained the good opinion of divers ſubjects, and had been propoſed as a volunteer for the defence of the country at a certain ſociety, &c., yet the defendant knowing the premiſes, but malicioufly intending to injure the plaintiff, and to ſubject him to the pains and penalties of the law, &c., and to cauſe it to be believed that he was a perſon of unnatural paſſions, and guilty of the crimes aforeſaid,

Slanderous words muſt be underſtood by the Court in the ſame ſenſe as the reſt of mankind would ordinarily underſtand them. Therefore where one ſaid of another that *his character was infamous*, that *he would be diſgraceful to any ſociety*, that *thoſe who propoſed him as a member of any ſociety muſt have intended an inſult to it*, that *he would publiſh his ſhame and infamy*, that DELICACY *forbad him from bringing a direct charge, but it was a* MALE *child who complained to him*; ſuch words were underſtood to mean a charge of unnatural practices, and ſufficiently certain in themſelves to be actionable, without the aid of an *innendo* to that purpoſe, which it was admitted could not enlarge the ſenſe. And held that ſuch words could not be juſtified by any plea naming, for the firſt time, the perſon from whom the defendant heard the complaint.

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or ſome of them, and to cauſe him to be rejected as a volunteer by the ſaid ſociety, and to be abhorred and ſhunned by all mankind, as a perſon unfit for and unworthy of all ſociety, on, &c., in a certain diſcourſe which the defendant had with divers ſubjects, members of the ſaid ſociety, &c., wrongfully, falſely, and malicioufly ſpoke theſe falſe, ſcandalous, and malicious words of and concerning the plaintiff having been propoſed as a volunteer as aforeſaid, viz., *His* (meaning the plaintiff's) *character is infamous. He would be diſgraceful to any ſociety. Whoever propoſed him muſt have intended it as an inſult. I will purſue him and hunt him from all ſociety. If his name is enrolled in the royal Academy, I will cauſe it to be eraſed, and will not leave a ſtone unturned to publiſh his ſhame and infamy; delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me* (meaning that a male child of nine years old had complained to the defendant of ſome unnatural crime committed by the plaintiff upon ſuch male child). And then the plaintiff averred that the words were ſo uttered and publiſhed by the defendant with intent and meaning to convey, and that the ſame were by the ſaid perſons in whoſe preſence they were ſo uttered and publiſhed, underſtood and believed to convey a charge againſt the plaintiff that he was a perſon of unnatural paſſions and appetites, and was capable of committing, and had committed the abominable crime of buggery, and was thereby rendered infamous, and unworthy of all ſociety, &c. There were ſeveral other counts, laying the ſame charge in different ways. To this the defendant pleaded, 1ſt, The general iſſue; 2dly, As to the words laid in the firſt count, that before the ſpeaking and publiſhing them, to wit, on, &c. a certain male child of nine years old, to

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wit, one *A. B.* did complain to the defendant of an unnatural crime before that time committed by the defendant upon ſuch male child. And ſo the defendant juſtifies ſpeaking the words. To this there was a general demurrer; and to this and a third plea to the ſame count, in ſubſtance the ſame, there were aſſigned as ſpecial cauſes of demurrer, that the defendant had not juſtified or anſwered the ſpecial matter of the firſt count, nor had averred that the complaints in thoſe pleas reſpectively alleged to have been made to the defendant were true, or that the defendant believed the ſame to be true; and that the matter of thoſe pleas do not amount to a traverſe of the firſt count, but are conſiſtent therewith, &c.; and that the matters attempted to be put in iſſue by thoſe pleas are immaterial, &c. The ſame cauſes of demurrer were aſſigned to the fifth plea, which contained a ſimilar juſtification of the words as laid in the other counts of the declaration. And to the fourth and ſixth pleas, the one applying to the firſt, and the other to all the counts, alleging, by way of juſtification, the fact of the plaintiff's having committed the crime imputed to him as well as the relation of *A. B*'s. complaint to the defendant before the uttering of the words, the plaintiff replied de injuriâ ſuâ propriâ abſque tali cauſâ.

Scarlett, in ſupport of the demurrer, relied on the authority of the rule in Lord *Northampton*'s caſe (*a*), recognized in *Davis* v. *Lewis* (*b*), that if one ſpeak ſlanderous words without naming at the ſame time the perſon from whom he heard them, he cannot afterwards juſtify it by naming the original ſlanderer. The reaſons for which are, that, by naming the perſon at the time, he gives the party in-

(*a*) 12 *Rep.* 133. 4. (*b*) 7 *Term Rep.* 17.

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jured an action againſt ſuch ſlanderer, and is himſelf a witneſs to prove it; and he alſo does not pledge his own credit to the ſlander, but merely that of the firſt relator of it, which ſo far abates the injurious effect of it. Upon this ground the juſtifications demurred to, where the name of the original author of the ſlander is firſt mentioned, are bad. But further, it would not be enough for the defendant even to name the author if, as in this caſe, he repeat the ſlander in ſuch a manner as to ſignify his own belief of, and intention to act upon it. As in *Maitland* v. *Goldney* (*a*) it was conſidered by Lord *Ellenborough* that one who repeated ſlander, after knowing it to be unfounded, could not juſtify it by having named his author at the time.

Burrough, contrà, contended that the declaration itſelf was bad, becauſe there was no direct negative of the boy's having made the complaint, as in *Meggs* v. *Griffith* (*b*); which accounts for the queſtion of juſtification having been there entered into upon the plea of not guilty, which put in iſſue the fact of the defendant having heard the ſlander from another before he repeated it. And *Crawford* v. *Middleton* (*c*) is in point to this: where the plaintiff having declared for ſlanderous words charging him with felony, ſaid by the defendant to have been ſpoken of the plaintiff by a perſon whom the defendant met on the road, judgment was arreſted by the opinion of three judges for want of an averment that in truth nobody had ſaid ſuch words to the defendant; againſt the opinion of *Twyſden* J. who thought that the words being laid to be ſpoken falſely and maliciouſly, and ſo found by the verdict, was a proof that nobody had ſaid ſo to him.

(*a*) 2 *Eaſt*, 426. (*b*) *Cro. Eliz.* 400. (*c*) 1 Lev. 82.

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[Lord *Ellenborough* C. J. The rule in Lord *Northampton's* caſe, confirmed in *Davis* v. *Lewis*, is, that ſlanderous words can in no caſe be juſtified upon the report of another, unleſs the name of the original ſlanderer be given at the time.] Thoſe caſes only apply where an action would lie upon the words againſt the original ſpeaker. But here no action could have been maintained againſt the boy upon any words imputed to him. And where words are uncertain in themſelves, as thoſe ſpoken by the defendant, they cannot be rendered more certain by an innuendo, without firſt introducing prefatory matter to which they may be applied, as was ſettled in *Rex* v. *Horne* (*a*). An innuendo cannot enlarge the ſenſe, which is attempted to be done, by introducing under it, that the words ſpoken, which were merely that a male child had *complained* to the defendant, meant that ſuch male child had *complained* to the defendant *of ſome unnatural crime*. [Lord *Ellenborough* C. J. Conſider the caſe then as if the innuendo were ſtruck out, and attend to the words themſelves; whether, when taken altogether, they do not naturally import a charge of this ſort. *Groſe* J. We muſt read the words in the ſame ſenſe as common people who heard would underſtand them.] The words are certainly abuſive; but they do not in themſelves neceſſarily point to the particular crime; though they might have been ſhewn to have done ſo by introductory matter. If the plaintiff had been before charged with having been guilty of indecency to a woman, theſe words would have been equally applicable.

Scarlett, in reply, obſerved, that the opinion of the three judges in *Crawfurd* v. *Middleton* went upon the ground that the defendant might have juſtified the ſlan-

(*a*) *Comp.* 684.

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derous words upon the report of another without naming him at the time; which was contrary to the rule in Lord *Northampton*'s case, now settled to be law. That from the frequency of actions for slander in former times the judges were accustomed to construe the words in mitiori sensu, where they would in strictness admit of different constructions; but since the case of *Baker* v. *Pierce* (*a*) a more sensible rule has prevailed, namely, to construe words in the sense in which they are commonly understood, as applied to the subject matter. And *Phillips* v. *Kingston* (*b*) is to the same effect. [*Lawrence* J. Many of the old cases on slander went to a very absurd length. There is one (*c*) where the charge was, that the plaintiff "had struck his cook on the head with a cleaver and cleaved his head; the one part lay on one shoulder, and another part on the other;" and yet the judgment was arrested after verdict because it was not directly averred that the cook was killed, but only argumentatively. But all those cases have been long set at rest.] Then as to the objection, that the words do not point at any certain crime, it is impossible to read them without understanding what sort of crime was meant to be imputed. The only use of the innuendo was to fix the defendant's intention to be to use the words in the common acceptation of them. The words state that the Plaintiff is unfit for all society, that he is unfit for the society of *men*; that the defendant would publish his shame and infamy; that he was restrained by *delicacy* from bringing a direct charge, and that the complaint was made to him by a *male* child of nine years old.

(*a*) 2 *Ld. Ray.* 959. Vide *Button* v. *Hayward*, as reported in 1 *Vin. Abr.* 507. from MS.

(*b*) 1 *Ventr.* 227. (*c*) This is the case of Sir *T. Holt* v. *Astgrigg*, *Cro. Jac.* 184.

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Lord ELLENBOROUGH C. J. (after ſtating the pleadings). The pleas demurred to are bad, becauſe they fall directly within the rule laid down in Lord *Northampton's* caſe (*a*), which was confirmed in the late caſe of *Davis* v. *Lewis* (*b*), that in order to enable a defendant to juſtify ſlanderous words upon hearſay he muſt diſcloſe at the time of uttering the ſlander the name of the perſon from whom he heard it, and it is not ſufficient to name him for the firſt time by his plea; the object of which is to give the plaintiff his action in the firſt inſtance againſt the original author of the ſlander. The pleas then being out of the way, the queſtion ariſes upon the ſufficiency of the words laid in the declaration to maintain the action. And it is firſt objected that it ſhould have been averred that nobody had made the complaint ſtated to the defendant. But that objection is founded upon the ſuppoſition, that if it had been ſo averred, the defendant would have been let into proof that ſuch complaint had in fact been made to him, and that he could have thereby juſtified ſpeaking the words. Lord *Northampton's* caſe, however, is an anſwer to that. If there had been ſuch an averment, it would have been wholly immaterial to the defendant's juſtification, becauſe he did not name the party at the time from whom he received the complaint. That brings it to the ſecond queſtion, whether the words ſpoken, unaſſiſted by the innuendo at the concluſion of them, which it muſt be admitted can only explain, and cannot extend the meaning of the antecedent words, do in their plain obvious meaning import the charge of any certain crime? and upon that I think there can be but one opinion. The defendant begins by ſaying, that the plaintiff's character is *infamous*. That

(*a*) 12 *Rep.* 133, 4. (*b*) 7 *Term Rep.* 17.

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of itſelf might only import general infamy; that he would be diſgraceful to any ſociety; that whoever propoſed him muſt have intended it as an *inſult*, meaning to the particular ſociety of which he was propoſed as a member; that is ſomewhat ſtronger, but might ſtill be general. Then he ſays he will purſue and hunt him from *all ſociety*. That ſhews that he intended to ſpeak of ſome crime which rendered him unfit for ſociety. Then he ſays that *delicacy* forbids him from bringing a direct charge. That points to ſome ſpecies of infamy, mixed with the intercourſe of the *ſexes*; and of what nature that was he alludes in a manner not to be miſtaken, when he adds that it was a *male* child of nine years old who *complained* to him. What elſe could the defendant mean by theſe expreſſions, but to charge the plaintiff with ſome infamous crime which would expel him from all ſociety, and that crime relative to a male child, which delicacy forbad him to make the ſubject of a direct charge. Applying our underſtanding to theſe words like any common perſons, can we give them any other meaning than that which the pleader meant to give them by the innuendo at the concluſion. But it does not ſtop here, for the count goes on to aver "that the words were ſo uttered and publiſhed by the defendant with intent and meaning to convey, and that the ſame were by the perſons in whoſe preſence they were ſo uttered, underſtood and believed to convey a charge of an unnatural crime againſt the plaintiff." Now upon a count ſo framed, the plaintiff muſt have gone into other proof than of the mere ſpeaking of the words, and he muſt have not only ſhewn that the defendant's meaning was to impute a crime of that nature to the plaintiff, but that the words were ſo underſtood by the hearers.

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Therefore not only upon the words themſelves, but followed as they are by the laſt-mentioned averment, we muſt take them to have been ſpoken in the ſenſe imputed.

GROSE J. We are firſt to conſider whether the declaration be bad; and if that be ſufficient, whether the pleas in queſtion be an anſwer to it. As to the declaration, I agree that the innuendo cannot extend the meaning of the words: and then the queſtion is, whether the words be in themſelves actionable? Now a court of juſtice muſt read the words in the ſame ſenſe in which the hearers would at the time they were ſpoken underſtand them. When I firſt read them I had no idea that any ſerious doubt could be entertained of the ſenſe meant to be conveyed by them, namely, an imputation of an unnatural crime. I think ſo ſtill; and therefore muſt conſider the declaration as ſufficient. Then as to the ſufficiency of the pleas demurred to; I cannot ſay, under the authority of the late determinations, that thoſe pleas can be ſupported. The queſtion having been ſo lately under conſideration, it is unneceſſary to enlarge upon it; it is ſufficient to ſay, that I adhere to the rule laid down in *Maitland* v. *Goldney* (*a*), as collected from the former caſes, that in order to juſtify the repetition of ſlanderous words ſpoken by another the defendant muſt give a certain cauſe of action againſt that other by naming the author of the ſlander, and giving the very words which he uſed.

LAWRENCE J. On the authority of Lord *Northampton*'s caſe, and the ſubſequent caſes, I agree that the pleas demurred to are bad: and I think that the rule on

(*a*) 2 *Esp.* 437.

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which they proceed is a good one; that if a party will repeat ſlanderous words which he hears another ſay, he ought to do ſo in ſuch a manner as will give the perſon injured an opportunity of bringing his action againſt ſomebody. But here no action could have been maintained upon theſe words againſt the boy. Whereas if the defendant had named the boy at the time, and repeated truly what he had ſaid to him, the plaintiff would have had his action againſt the boy. The only queſtion then is this, Whether the declaration be ſuſtainable? and I agree with the defendant's counſel, that if the words, as laid, would not, in the ordinary underſtanding of mankind, bear the meaning imputed to them, the innuendo will not help them. In *Peake* v. *Oldham* (*a*) Lord *Mansfield* lays down the rule, that "where words from their general import appear to have been ſpoken with a view to defame a party, the Court ought not to be induſtrious in putting a conſtruction upon them different from what they bear in the common acceptation and meaning of them." The argument then goes too far, when it is contended that the words muſt be ſuch as muſt neceſſarily bear a criminal import, and no other, in order to maintain an action upon them. For then, if the words had been a direct charge of an *unnatural crime* by uſing thoſe very words, it might be argued that no action would lie upon them without ſome explanation of what was meant by an *unnatural* crime; as it might be ſaid that all crimes are againſt the order of nature; and ſo they are in a general ſenſe. But the true queſtion is, whether in the ordinary acceptation of the words, any perſon can reaſonably doubt of their ſignification. No ſuch doubt can, I think, be entertained in this caſe, and therefore the declaration is good.

(*a*) *Cowp.* 275-8.

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LE BLANC J. It is clear that the pleas cannot be ſupported upon the caſes which have been decided, becauſe a perſon who reports ſlanderous words which he heard from another muſt give the name of the perſon from whom he heard it at the time he reports it; and it is not ſufficient to do ſo for the firſt time in his plea to an action for thoſe words. Then as to the ſufficiency of the declaration, if the words themſelves do not convey to all perſons who hear them what the ſenſe of the ſpeaker was, I admit that they cannot be extended by an innuendo. But nobody can read theſe words without ſeeing what they meant to impute againſt the plaintiff. It is not ſufficient to ſhew by argument that the words will admit of ſome other meaning; but the Court muſt underſtand them as all mankind would underſtand them, and we cannot underſtand them differently in court from what they would do out of court. And it would be impoſſible for a number of perſons, indifferently aſſembled, not to agree in the meaning which has been imputed to theſe words in the declaration.

Judgment for the plaintiff upon the demurrers to the 2d, 3d, and 5th pleas.

COLLINS *againſt* Ld. Viſcount MATHEW.

Tueſday, Nov. 13th.

A plea of nul tiel record, pleaded to an action of debt on an Iriſh judgment recovered, muſt conclude to the country; for though, ſince the Union, ſuch judgment be a record, yet it is only proveible by an examined copy on oath, the veracity of which is only triable by a jury.

THE plaintiff declared in debt upon a judgment recovered in the court of Exchequer in *Ireland* for 360*l.* 16*s.*, and alſo 50*s.* and 2*d.* *Iriſh* currency, for damages and coſts, "as by the *record* and proceedings thereof remaining in the ſaid court of our Lord the King of his Exchequer

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chequer at *Dublin* in *Ireland* aforeſaid, more fully appears, &c. which ſaid judgment ſtill remains in the ſame court of *Dublin* in *Ireland* aforeſaid in full force and not ſatisfied," &c.: and concluding with an averment that the ſaid 360*l.* 16*s.* and 50*s.* 2*d.* ſo recovered were of the value of 335*l.* 7*s.* 2*d.* of lawful money of *Great Britain*. To this there was a plea of nul tiel record, with a verification; and a demurrer on the part of the plaintiff to ſuch plea; aſſigning for ſpecial cauſes, that the plea of *nul tiel record* is not pleadable to an action of debt on a foreign judgment; or, if pleadable at all, it ought to have concluded to the country, and not with a verification.

Wood, in ſupport of the demurrer, contended at firſt that this fell within the ſame diſtinction as governed the caſe of actions on foreign judgments, to which it was ſettled that *nul tiel record* could not be pleaded. For ſince the appellate juriſdiction of this Court from the courts of *Ireland* was taken away (*a*), there is no method of bringing the original *Iriſh* record into this court, and conſequently no way of trying its exiſtence but by an examined copy, and that verified on oath, of which a jury only can judge, and not the court by whom the queſtion of the identity of our own records is properly determinable. And this gives riſe to the next objection, that if it be pleadable at all as a *record*, the plea ought to have concluded to the country, and not with a verification.

The Court now intimated a clear opinion, that ſince the Union between *Great Britain* and *Ireland* the judgments of the *Iriſh* courts are properly pleadable as *records*. And Lord *Ellenborough* C. J. ſaid, that ſuch records were now

(*a*) Vide 23 *Geo.* 3. *c.* 28. explaining and enforcing the ſt. 23 *Geo.* 3. *c.* 53.

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brought before the Houſe of Lords of the United Kingdom on appeals and writs of error, though no longer returnable into this court by certiorari. But his Lordſhip, addreſſing himſelf to the defendant's counſel, aſked what anſwer could be given to the laſt cauſe of demurrer aſſigned? For though the *Iriſh* judgment be a record, yet being only proveable by an examined copy on oath, the verity of the evidence could only be tried by a jury, and not by the Court; and therefore the concluſion ſhould have been to the country.

Lawes, in ſupport of the plea, (as to this, which was the principal point made in argument,) ſaid, that the judgments of the *Iriſh* courts being admitted to be records ſince the Union, muſt be taken to be and pleadable as ſuch, with all legal conſequences, as the records of other courts within this part of the kingdom: and ſuch pleas have always been pleaded with a verification. The caſes of *Walker* v. *Witter* (*a*), and *Galbraith* v. *Neville* there cited (*b*), which were actions of debt on foreign judgments, where the plea of nul tiel record was ſaid to be a nullity, do not apply.

The Court all agreeing that the objection to the concluſion of the plea was well founded, for the reaſon before ſtated, gave

Judgment for the Plaintiff.

(*a*) *Dougl.* 1.

(*b*) *Ib.* 5, 6. It is there ſtated that the rule for a new trial in *Galbraith* v. *Neville* was made abſolute. But according to my note of the caſe, it ſtood over from *Euſter* 29 to *Mich.* 31 *Geo.* 3. for the Court to adviſe upon it, when Lord *Kenyon* C. J. ſaid, that the Court had conſidered the matter, and were all of opinion, that no new trial ought to be granted. He added, that, without entering into the queſtion how far a foreign judgment was impeachable, it was at all events clear that it was primâ facie evidence of the debt; and they were of opinion that no evidence had been adduced to impeach this; and therefore diſcharged the rule.

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Friday, Nov. 16th.

SMITH *againſt* M'CLURE.

A bill of exchange payable to the *order* of *A.* is payable to *A.*, without alleging any order made, and it is ſufficient to declare that *A delivered* the bill to the defendant, which he *accepted*, and by reaſon of the premiſes and according to the cuſtom of merchants became liable to pay the contents to *A.*; without alleging a *re-delivery* of the bill by the defendant; for if a re-delivery, or ſomething tantamount to ſhew the aſſent of the drawee to charge himſelf, be neceſſary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c.

THE plaintiff declared upon a bill of exchange, dated 1ſt *December* 1802, drawn by himſelf upon the defendant at two months for 134*l.* *payable to his own order*, and that he delivered the ſaid bill to the defendant, which he upon ſight thereof *accepted* according to the cuſtom of merchants; *by reaſon of which ſaid premiſes* and according to the ſaid cuſtom and law of merchants the defendant became liable to pay to the plaintiff the ſum ſpecified in the ſaid bill, &c. and being ſo liable the defendant promiſed to pay, &c. To this there was a demurrer aſſigning for ſpecial cauſes, 1ſt, that although it is alleged that the plaintiff delivered the ſaid bill of exchange to the defendant before his acceptance thereof, yet it is not alleged, nor does it appear that he ever re-delivered the ſame to the plaintiff. 2. That it is not alleged nor does it appear that the plaintiff did not make any *order* for the payment of the ſaid bill to any other perſon, or that he ever made any *order* for the payment of it to himſelf.

W. Walton in ſupport of the demurrer, as to the firſt objection ſaid, that it did not appear by the declaration but that the defendant had kept the bill when it was delivered to him; and as it was drawn by the plaintiff himſelf, it never was of any value while in his hands, nor could become ſo till re-delivery by the acceptor, by which he finally conſented to charge himſelf with the payment of it. And ſecondly, that being drawn payable only to the *order* of the plaintiff, and not *to him* or *his order*, and no order by him being ſtated to have been afterwards made, he ſhewed no title in himſelf to recover. But

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Lord ELLENBOROUGH C. J. said, there was nothing in either of the objections. That the acceptance of the bill, which was admitted by the demurrer, and muſt be taken to be a perfect acceptance, veſted a right in the drawer to ſue upon it; and if after ſuch an acceptance the acceptor improperly detained the bill in his hands, the drawer might nevertheleſs ſue him on it, and give him notice to produce the bill, or on his default give parol evidence of it. And as to the ſecond ground of objection, a bill payable to a man's own order was payable to himſelf, if he did not order it to be paid to any other; and no ſuch order appearing, it muſt be preſumed that none was made (*a*).

Per Curiam, Judgment for the Plaintiff.

(*a*) Vide *Frederick* v *Cotton*, 2 *Show.* 8. S. P. and *Fiſher* v. *Pomfret*, 12 *Mod.* 125. and *Cunningham's Law of Bills of Exch.* 66.

The KING *againſt* DOUGLAS.

Friday, Nov. 16th.

A ſeaman ſerving in the merchant ſervice is not exempt from being impreſſed becauſe he is a freeholder.

ERSKINE applied for a writ of habeas corpus to bring up the body of the defendant, who had been impreſſed and taken on board one of his Majeſty's ſhips of war. He moved this on an affidavit, ſtating that the defendant, who was ſerving as a mate on board a merchant veſſel, was at the time of his being impreſſed ſeiſed of a freehold eſtate of the annual value of 56*l.*, which had been ſome time before bequeathed to him, and of which he was in poſſeſſion of the rents and profits. He ſaid that he was not prepared to ſtate any direct authority that a freeholder was not liable to be impreſſed; but that *Good*'s caſe (*a*) at leaſt ſhewed that it was a matter of

(*a*) 1 *Blac. Rep.* 251.

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doubts and conſidering the importance of the conſequences in a general view, it was well deſerving of mature conſideration before ſuch an exemption was negatived. There the writ was moved for on an affidavit that the party was in poſſeſſion of a freehold eſtate of 26*l.* a-year; but it not being negatived that he was a ſeafaring man, the Court deſired to have that point cleared up; and it being ſworn the next day that he was only a ſhip-carpenter, and never uſed to the ſea, the writ was awarded. But, in order to obviate any miſconſtruction, the Court declared that they had given no opinion as to the poſſeſſion of the property not being of itſelf ſufficient to procure the man's diſcharge. But

The Court, being ſatisfied, upon inquiry, that the defendant was actually engaged in the merchant ſervice at the time he was impreſſed; and being anſwered in the negative to a queſtion, whether there were even a dictum in the books in ſupport of a freeholder's claim of exemption from the impreſs ſervice, who in other reſpects was a fit ſubject for it, ſaid that they ſaw no ground for granting the writ.

Writ denied.

Wedneſday, Nov. 21ſt.

The KING *againſt* CUNNINGHAM and Others.

Iron mines are not rateable to the relief of the poor; and being rated conjointly with coal mines, the coal whereof was raiſed by the owner of the lands for his own uſe in ſmelting the iron, the order of Seſſions confirming ſuch rate generally, without aſcertaining the proportion at which each was rated, was quaſhed.

UPON the appeal of *Cunningham* and others, iron maſters, and co-partners, againſt a rate made for the relief of the poor of the pariſh of *Bedwelty*, at the Seſſions holden for the county of *Monmouth*, the rate was

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confirmed ſubject to the opinon of this Court on the following caſe:

Meſſrs. *Cunningham* and Co., who are leſſees and occupiers of a large tract of land in the pariſh of *Bedwelty*, and of ſeveral mines of iron ore and coal under the ſame, were aſſeſſed in the rate as follows: "For the farm and lands 32*l.* For the iron and coal mines 70*l.*" The iron ore and coal which they raiſe is applied ſolely to the manufacturing of iron in furnaces built for that purpoſe, part of which is raiſed under the farms and lands rated, and part under the mountains. Meſſrs. *Cunningham* and Co. objected to the rate on the following grounds; Firſt, That having been charged for part of the ſurface, they ought not to be ſeparately charged for minerals under that ſurface. Secondly, That iron mines are not aſſeſſable to the poor's rate. Thirdly, That the coal itſelf, being raiſed for making iron, is alſo not liable to be aſſeſſed.

Dauncey (and *Abbott* was to have argued on the ſame ſide) in ſupport of the order of Seſſions, beginning by obſerving, that it could not be contended on the part of the defendants, who appealed againſt the rate, that coal-mines were not rateable,

Lord ELLENBOROUGH C. J. ſaid, that it was likely they would contend, and that with ſucceſs, that iron-mines were not rateable: and that though the coal-mines were rateable (concerning which it could make no difference whether the coal were ſold by the owner to another who uſed it in an iron-foundery, or whether he applied it himſelf to the like purpoſe), yet being rated conjointly with ſomething elſe which was not rateable, and the Court

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here having no means to aſcertain the ſeveral proportions, ſo as to rectify the exceſs of the rate, they could do nothing elſe than quaſh the order of Seſſions, which had confirmed the rate generally, ſuch order being at all events wrong.

Dauncey thereupon admitted that he could not ſupport the rate in toto, as iron-mines were not rateable, not being named, as coal-mines are, in the ſtat. 43 *Eliz. c.* 2.: but he ſuggeſted, as the rate was good for the farm and lands, and for the coal-mines, that it might be ſent back to the Seſſions to aſcertain the proportion at which the iron-mines were rated, and amend the rate by ſtriking out ſo much. But

Gibbs, contrà, ſaid, that it would be as eaſy to make a new rate as to amend the former. And

The Court ſaid, that as the order of Seſſions was certainly wrong in affirming the rate ſo framed, there was no objection to quaſh it.

Order of Seſſions quaſhed.

Saturday, Nov. 24th.

The KING *againſt* WATSON.

Where a corporation were ſeiſed in fee of lands, which by the cuſtom were annually meted out under their control by a leet jury, according to a certain ſtint, to ſuch of the reſident burgeſſes who choſe to ſtock the ſame; they paying 19*s.* 4*d.* to each of the other burgeſſes who did not ſtock: held that the burgeſſes who ſo ſtocked were *tenants in common* of the lands ſo occupied by them, and as ſuch *occupiers* were liable to be rated for the ſame.

JAMES WATSON, an inhabitant, and occupier of a houſe in the pariſh of *St. Mary*, in the borough of *Huntingdon*, in the county of *Huntingdon*, appealed to the Quarter Seſſions for that borough againſt a poor's-

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rate of the ſaid pariſh, dated the 9th of *May* laſt, objecting, by his notice of appeal, to the rate, becauſe *E. Howſon*, *R. Thompſon*, and *C. Garner* were not rated for certain common lands, called the Mill Common and Pitts, ſituate in the ſaid pariſh of *St. Mary*, in, over, and upon which ſaid lands the ſaid *Howſon*, *Thompſon*, and *Garner* have certain commonable rights for feeding and depaſturing their cattle, according to the cuſtom of the ſaid common and common lands, according to their reſpective rights as commoners uſing the ſame; and which ſaid lands, ſo called the Mill Common and Pitts as aforeſaid, are in the reſpective occupation of the ſaid *Howſon*, *Thompſon*, and *Garner*, for the purpoſe of enjoying the ſaid commonable rights, and from which they actually do derive a local, viſible, and beneficial advantage, by ſtocking, uſing, and feeding the ſame with their commonable cattle reſpectively, and therefore ought to be rated for the ſame. Upon hearing this appeal the juſtices confirmed the ſaid rate, ſtating the following caſe for the opinion of this Court: "That the mayor, aldermen, and burgeſſes of the borough of *Huntingdon* are the owners or proprietors of certain large tracts of land within the ſaid borough, uſed as a common of paſture, and ſtocked by ſuch reſident burgeſſes of the ſaid borough in right of their burgerſhips as think proper to ſtock, according to a ſtint annually fixed by the leet jury, who are burgeſſes of the borough, under the control of the mayor for the time being; part of which lands, namely the Mill Common and Pitts mentioned in the notice, are in the pariſh of *Saint Mary*, and part in other pariſhes in the ſaid borough. That no part of the ſaid common was ever aſſeſſed to the poor's-rate. That there are about 80 reſident burgeſſes who have rights of common, ſome of whom ſtock to the full of

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their rights, others partially, and ſome do not ſtock at all; but in the latter caſe receive an annual payment of 19*s.* 4*d.* in lieu thereof, which is paid by thoſe who do ſtock. That the ſaid *Howſon*, *Thompſon*, and *Garner*, the perſons named in the notice of appeal, are burgeſſes, having right to ſtock the common, and who did ſtock in the courſe of the year 1804."

Gibbs and *Wilſon*, in ſupport of the Order of Seſſions. It does not appear that any of the perſons, the omiſſion of whom in the rate is complained of, are actual inhabitants of or occupy excluſively any lands within the pariſh of *St. Mary;* and therefore the objection is reſolvable into this, that certain perſons reſident in another pariſh have not been rated for an incorporeal right, ſuch as a right of common is, which they exerciſe within the pariſh. But there is no inſtance of the rating of any ſuch right; nor is it warranted by the ſtat. 43 *Eliz.*; and the rating it would be attended with practical inconveniences. The only caſe where the attempt has been made is *R.* v. *Aberavon* (*a*), which was recently decided; but there the Seſſions had quaſhed the rate in which the common land was omitted: and all that this Court decided was, that the land yielding profit was rateable in its nature; without determining the queſtion of occupancy, whether the corporation who were ſeiſed in fee of the land, and who permitted poor perſons and others to ſtock it, or the perſons by whom it was ſo ſtocked, were to be conſidered as the occupiers to be rated. There too the perſons occupying it ſtocked to an indefinite amount; here according to a certain ſtint fixed by the leet jury. It is therefore

(*a*) Ante, 453.

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nothing more than a verbal permiſſion to theſe perſons to turn on a certain number of cattle for a year. Taking it however to be a right exerciſed by grant, it is not annexed to real property, but a grant of a ſtinted right of common in groſs for a year. Now the ſtat. 43 *Eliz. c.* 2. has no words to comprehend perſons having ſuch a right as this. The only deſcription which can apply to them is "*occupiers* of lands;" but they could not maintain treſpaſs againſt a wrongful intruder, and therefore they cannot be *occupiers* in the legal ſenſe of the word, who muſt be in poſſeſſion of the land itſelf. A *cattle-gate* (*a*) indeed has been holden to be a tenement, the occupation of which would enable a perſon to gain a ſettlement; but that gives a title to the ſoil, and the intereſt paſſes by leaſe and releaſe. Then the numbers intereſted, with the minuteneſs and complexity of the intereſt to be rated, are material to be conſidered in the deciſion of a new queſtion. The numbers here intereſted amount to 80, and muſt in many inſtances be indefinite. Where large commons run into different pariſhes, all the perſons who ſtock will be liable to be rated proportionably in each, when in many inſtances the intereſt muſt be very minute, and not capable of being divided ſo as to be the ſubject of rating. By the ſame rule a right of digging ſtone or turf, or getting ſand, will be rateable, and the omiſſion of every trifling intereſt will be the ground of an appeal. If land ſo applied be rateable at all, it would be leſs inconvenient to rate it in the hands of the corporation who are ſeiſed of the freehold; though many difficulties of another ſort would preſent themſelves againſt ſuch a rating. In *R.* v. *Jolliffe* (*b*), one who had a way-leave over another's land, which was an enjoyment of the ſoil

(*a*) 1 *Term Rep.* 137. (*b*) 2 *Term Rep.* 90.

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in a particular mode, was holden not rateable for it, though it were a thing of value and let for a large rent; becauſe the occupier of the land over which it paſſed was rated for it, and the land could not be rated twice. That indeed was ſaid to be only an *eaſement*; but there is no magic in words. And in *R.* v. *Bell and others* (*a*), where the occupiers of ſuch way-leaves were deemed rateable, it was becauſe the land itſelf was conveyed to them. In the former caſe the owner of the land was, from the nature of the thing, excluded from any actual enjoyment of ſo much of it as was appropriated to the way-leave; and yet he was deemed to be the occupier in law. So here, if there be any occupier, it muſt be the corporation. And it was ſettled in *R.* v. *Gardner* (*b*) that a corporate body is rateable.

Erſkine and *Beſt* contrà. The caſe of *The King* v. *Aberavon* is in point to ſhew that property of this deſcription muſt be rated, and that a rate omitting it altogether was properly quaſhed. [Lord *Ellenborough* C. J. The Court decided nothing in that caſe upon the queſtion of occupancy. All that we determined was, that we could not ſay that the Seſſions had done wrong in quaſhing a rate, when a large track of land beneficially occupied was wholly omitted to be rated.] There it was uncertain by what right the ſeveral perſons ſtocked the common; but here there is a diſtinct occupation ſtated in the ſeveral reſident burgeſſes, who have their reſpective rights individually allotted to them by the leet jury, and who have in fact a beneficial enjoyment of the land of a determinate value. It is immaterial by what title they claim the poſſeſſion of the land; it is ſufficient that they are in the

(*a*) 7 *Term Rep.* 598. (*b*) *Cowp* 98.

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actual beneficial occupation of it. If an officer of a corporation be entitled in virtue of his office to a diſtinct occupation of a tenement or land, he, and not the corporation, muſt be rated for it. So of any other public officer (a). The corporation as ſuch could have no right to occupy in this caſe after the perſonal occupation by ſtint was ſettled by the leet jury amongſt the individual reſident burgeſſes. The right is exerciſed here by a definite number of known perſons, and not as in the *Aberavon* caſe by an indefinite, unknown, and fluctuating body. The value of this right is a ſubject of calculation, and diviſible. Each of thoſe who ſtock pay 19*s.* 4*d.* to thoſe who do not. A right of this ſort may be conſidered as a tenement; as a common in groſs was holden to be in *R.* v. *Derſingham* (b) and the enjoyment of it is an inhabitancy in law. And every occupier of land is rateable, though he be not actually reſident within the pariſh. The ability to maintain treſpaſs is not the criterion of being liable to be rated in reſpect of the property. The impropriator of tithes is rateable, who cannot be ſaid to occupy them, and cannot maintain treſpaſs. [*Lawrence* J. Tithes are rateable by the expreſs words of the ſtatute 43 *Eliz.* But the queſtion is very different where the party, if rateable at all in reſpect of the land, muſt be rated as *occupier*. Occupation, properly ſpeaking, implies *poſſeſſion* (c), and treſpaſs can only be brought by him who is in poſſeſſion of the land.] Then the burgeſſes who ſtock muſt be conſidered as in poſſeſſion, ſince they have a right in excluſion of all others. If there were only one

(a) Vide *Eyre* v. *Smallpace*, 2 *Burr.* 1059. *R.* v. *Munday and Others*, 1 *Eaſt*, 584.; and *Rex* v. *Terrett*, 3 *Eaſt*, 506.

(b) 7 *Term Rep.* 671.

(c) Vide *Jones* v. *Mansel*, *Doug.* 302.

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who ſtocked, he would be in the actual and ſole poſſeſſion of land of the admitted value of nearly 80*l.* a-year, for which it would be impoſſible to contend that he would not be rateable, however his title to it were derived; then it cannot make any difference that the number of thoſe who ſtock is greater, the value being diviſible.

Lord ELLENBOROUGH C. J. The whole cloud which has been caſt over the caſe ariſes from a miſconception of the nature of the property occupied by theſe perſons. It has been reſembled to an incorporeal hereditament; but it is no ſuch thing. The corporation are the owners in fee of the land, and they dole it out annually, according to the cuſtom, to certain of the burgeſſes; ſuch of them as take it paying a certain ſum to thoſe who do not turn on any ſtock. Then when the number of perſons who ſtock it is aſcertained, what is there to diſtinguiſh them from other tenants in common? Each of them might maintain treſpaſs for an injury done to his occupation in common. It has been decided that a common in groſs is a tenement, and it ſhould ſeem from thence to follow that it is rateable: but without conſidering that, this caſe ſteers clear of all difficulty; for I do not conſider this as an incorporeal hereditament, but as a corporeal tenement, of which the ſeveral burgeſſes who ſtock are tenants in common. And we cannot ſay that an enjoyment of land which is of ſuch value as that thoſe who do not actually enjoy it, but who might if they ſo pleaſed, are entitled to a compenſation from thoſe who do, is not ſomething which is rateable; and being rateable, it muſt be rated in the hands of thoſe who have the beneficial poſſeſſion of it.

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GROSE J. This is in truth a queſtion whether the occupiers of land are rateable for that land. The portion of each is indeed ſmall, but that can make no difference. This is common land belonging to a corporation who deal it out annually amongſt certain of the burgeſſes, and when they are aſcertained, they are tenants in common of the land. Then have they any thing worth rating? It is ſtated, that there are 80 in number of them, and that each of thoſe who do not ſtock receives annually 19*s.* 4*d.* in payment from thoſe who do. This ſhews that thoſe who do ſtock have a beneficial enjoyment of the land, for which they think it worth while to pay ſo much.

LAWRENCE J. This is the caſe of certain perſons, who, having, as I underſtand the caſe, the excluſive enjoyment of land for a year for the purpoſe of turning on their cattle, are to be conſidered as tenants in common of it. The corporation are the owners of the land; the burgeſſes it ſeems are by the cuſtom entitled to have it divided amongſt certain of them every year, according to a certain ſtint ſettled by the leet jury: when it is ſo meted out to them, they are tenants in common. I think it would be very difficult, after the land was ſo meted out, to ſay that the corporation could maintain treſpaſs for any injury done on the land to the rights of theſe perſons; becauſe if that were ſo, it would ſhew that the corporation were in the occupation of it. For as I ſaid before, treſpaſs can only be maintained by thoſe who are poſſeſſed of the land. But, according to what I collect from this caſe, the reſident burgeſſes are the occupiers.

LE BLANC J. It appears that there is a large track of commonable land, yielding profit, and the objection made

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is, that the commoners by whom it is ſtocked have not been rated for it. Then how does the caſe ſtand? The corporation are the owners of it. How is it enjoyed? Not by the corporation as a body; but it is every year meted out by them, according to the cuſtom, amongſt certain of the burgeſſes, by whom it is to be enjoyed for one year. It appears from hence, that the fee is veſted in the corporation for the benefit of the reſident burgeſſes. It is meted out annually to ſuch of theſe as chuſe to ſtock, and thoſe, who do not, receive a compenſation from the reſt. Thoſe perſons then are the actual occupiers of it. It is improper therefore to call it a right of common; becauſe it is holden in fee by the corporation for the benefit of the reſident burgeſſes. The corporation themſelves, as a corporation, have no benefit from the land, but the reſident burgeſſes to whom it is meted out annually by the leet jury. This view of the caſe avoids the difficulty ſtated in the argument of rating perſons having a right of common running into ſeveral pariſhes: for this is a caſe of perſons having an equitable right to the land, the fee of which is veſted in the corporation for their benefit.

Per Curiam, Let the rate be ſent back to the Seſſions to be amended by the inſertion of the burgeſſes occupying the land.

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WARD *againſt* MALLINDER.

Monday, Nov. 26th.

Where a verdict was taken for 10*l.* in treſpaſs, ſubject to an award of damages, and *the coſts to abide the event*, if the arbitrator find leſs than 40*s.* damages the plaintiff cannot have his coſts, though it be alſo found that the treſpaſs was *wilful*, and that the defendant ſhould pay the plaintiff his coſts: for coſts being directed to abide *the event*, means the *legal* event; and the authority of a judge to certify for coſts under the ſtat. 22 & 23 Car. 2. c. 9. where the treſpaſs is wilful is not transferred to the arbitrator under ſuch a rule of reference.

IN [illegible] breaking and entering the plaintiff's cloſe [illegible] his corn growing there, with the deſ[illegible]try, on not guilty pleaded, it was agreed at [illegible]izes that a verdict ſhould be taken for the plaintiff [illegible] 10*l.* damages, ſubject to the award of an arbitrator, and the coſts to abide the event. The arbitrator afterwards awarded 10 ſhillings damages, but alſo found that the treſpaſs was wilful, being after notice, and that the defendant ſhould pay the plaintiff his coſts. The damages however being reduced below 40*s.*, and there being no certificate of a Judge under the ſtat. 22 & 23 *Car.* 2. *c.* 9. that the treſpaſs was wilful, the Maſter doubted whether he had authority under this direction of the arbitrator to tax the plaintiff his coſts. Whereupon

Clarke and *Reader* moved that the Maſter might be at liberty to tax the plaintiff his coſts. They admitted that the caſe of *Swinglehurſt* v. *Altham* (*a*) preſſed againſt them; but endeavoured to diſtinguiſh it from the preſent by obſerving, that in that caſe the arbitrator who had awarded under 40*s.* damages was ſilent as to the coſts, which therefore properly followed the legal event: whereas here the arbitrator has expreſsly found the treſpaſs to be wilful, and directed the defendant to pay the coſts. Either then this was a caſe within the ſtat. 22 & 23 *Car.* 2. *c.* 9. and the certificate of the arbitrator, who is put in the place of the judge, is equivalent to a certificate of the judge himſelf that the treſpaſs was wilful; or it is a caſe wholly

(*a*) 3 *Term Rep.* 138.

beſide

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beſide that ſtatute, being one where no certificate could be granted, and therefore the plaintiff would ſtill be entitled to his coſts under the ſtatute of *Glouceſter*; as in the caſe of an execution of a writ of inquiry in treſpaſs, where though the damages be aſſeſſed at leſs than 40*s*. the coſts follow. They obſerved alſo that the two caſes cited in *Swinglehurſt* v. *Altham*, and on which the Court relied, did not warrant the general concluſion drawn from them, that the arbitrator's award of the treſpaſs being wilful was not tantamount to a Judge's certificate under the ſtatute. For they were not caſes of treſpaſs, and in neither did the arbitrator aſſume to certify. In one of them the plaintiffs againſt whom the award was made were executors, and therefore not liable to coſts: and in the other the ſum found to have been originally due to the plaintiff was under 40*s*., and therefore in no event could he have had coſts. And (in anſwer to a queſtion put by the Court, how it could appear by the record that the treſpaſs was wilful ſo as to warrant them in giving judgment for coſts, when the verdict as entered on the roll would appear to be for damages under 40*s*.,) they obſerved, (in which they were ſupported by the Maſter,) that the granting of a certificate by the Judge is never entered on the roll.

Lord ELLENBOROUGH C. J. It is to be regretted that no proviſion was made in the rule of reference for the event which has happened, of the arbitrator's finding the damages to be under 40*s*., but that the treſpaſs was *wilful*, in which caſe a Judge's certificate, if the cauſe had been tried and the ſame concluſion come to before the court, would have carried the coſts. We have however the authority of a decided caſe that an arbitrator is not in this reſpect ſubſtituted in the place of a Judge, to whom

alone the ſtatute has given the power of certifying for coſts. Then the caſe ſtands as a verdict for 10*s.* damages, without a certificate; and the coſts being by the rule of reference to abide *the event*, muſt be taken to mean the *legal* event; and therefore the plaintiff cannot have coſts.

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Per Curiam, Rule refuſed.

RIGHT, on the Demiſe of W. FISHER, S. NASH, and J. HYRONS, *againſt* ANN CUTHELL.

Monday, Nov. 26th.

THIS was an ejectment to recover poſſeſſion of twelve certain meſſuages and the appurtenances in the pariſh of *St. Botolph, Aldgate*, in the county of *Middleſex*. The firſt count was on the demiſe of *Fiſher*, *Naſh*, and *Hyrons*: the ſecond on the demiſe of *Fiſher* and *Naſh* only, which latter it was admitted could not be ſupported. The premiſes conſiſted of houſes, formerly the property of one *Moſes Adams*, and by him demiſed by a leaſe dated 20th of *October* 1789 to one *William Cuthell*, (ſince deceaſed, whoſe repreſentative the defendant is) for a term of 21 years commencing from *Michaelmas* then laſt paſt. In which leaſe was contained a *proviſo* that in caſe either landlord or tenant, or their reſpective heirs, executors, &c. ſhould be deſirous at the expiration of the firſt 7 or 14 years of the term to determine the leaſe, and ſhould give ſix months previous "notice in writing *under his or*

Where a leaſe for 21 years contained a proviſo that in caſe either landlord or tenant, or their reſpective heirs and executors, wiſhed to determine it at the end of the firſt 14 years, and ſhould give ſix months' notice in writing *under his or their reſpective hands*, the term ſhould ceaſe; held that a notice to quit, ſigned by *two* only of *three* executors of the original leſſor, to whom he had bequeathed the freehold as joint tenants, expreſſing the notice to be given *on behalf of themſelves and the third executor*, was not good under the proviſo, which required it to be given under the hands of all three; neither could ſuch notice be ſuſtained under the general rule of law, that one joint tenant may bind his companions by an act done *for his benefit*; for non conſtat that the determination of the leaſe was for the benefit of the co-joint tenant; which it was incumbent on the party who wiſhed to avail himſelf of it to prove. And the notice to quit being ſuch as the tenant was to act upon at the time, no ſubſequent recognition of the third executor will make it good by relation: nor was his joining in the ejectment evidence of his original aſſent to bind the tenant by the notice.

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their reſpective hand or hands to or for the other or others, or for the heirs, executors, &c. of the other or others of them, then the term ſhould ceaſe." *Adams* afterwards died, having made his will, wherein he appointed *Fiſher*, *Naſh*, and *Hyrons* his executors (*a*), who proved the will. Six months previous to the expiration of the firſt 14 years, (*Hyrons* one of the executors being at that time abroad,) *Fiſher* and *Naſh* by a notice in writing dated 23d of *March* 1803, reciting the indenture of leaſe of the premiſes to *W. Cuthell* for 21 years, and the proviſo abovementioned; and reciting further that *Moſes Adams* had in his lifetime made his will and appointed *Fiſher*, *Naſh*, and *Hyrons* his executors, and that they had proved the will and taken on themſelves the execution thereof, and were ſtill executors of the ſame, proceeded thus: "Now the ſaid *W. Fiſher* and *S. Naſh* do *on the part and behalf of themſelves and the ſaid J. Hyrons* hereby give you (the defendant) notice that they are deſirous and do intend at the expiration of the firſt 14 years of the ſaid term of 21 years to determine the ſaid leaſe. And they do further *for themſelves and the ſaid J. Hyrons* require and demand of you the poſſeſſion of all the premiſes at the expiration of the firſt 14 years, &c. and give you notice to quit and deliver up the poſſeſſion thereof at that time accordingly." Signed "*W. Fiſher* and *S. Naſh*." At the trial of this caſe before Lord *Ellenborough* C. J. at the laſt *Weſtminſter* Sittings, the plaintiff proved his caſe by producing the original leaſe, with the proviſo; the death of *Adams*; his will, whereby the leſſors of the plaintiff were appointed his executors; the poſſeſſion of the defendant under *W. Cuthell* deceaſed;

(*a*) It was admitted that the meſſuages were freehold, and that the executors who had a power to ſell took as joint tenants in fee.

and

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and the abovementioned written notice to quit, ſigned by two only of the executors, the other being abroad; but no authority was proved from the latter to the other two, to enable them on his behalf to determine the leaſe, further than as it might be preſumed by law from the circumſtances of the notice itſelf, and the ejectment having been brought in the name of the three. It was objected however by the defendant's counſel, that no ſuch preſumption could be made, and that as the executors were joint-tenants under the will, the two could not bind the third by ſuch an act as this, without his concurrent aſſent at the time, and that no ſubſequent ratification of the third, even if ſuch appeared, (which was denied) would be ſufficient to bind the defendant. His Lordſhip being of this opinion nonſuited the plaintiff. It was moved on a former day in this term to ſet aſide the nonſuit, on the ground that the notice itſelf, purporting to be given by the authority of all three of the executors, muſt be taken to have been ſo until the contrary were proved. That it need not have been ſigned by either of them; for if delivered by a common agent or ſteward, as by their authority, it would have been ſufficient, without proving ſpecifically his warrant from each of them individually. But that if there were any doubt of the authority, the act of the two was recognized by the third, in his permitting the ejectment to be brought in his name without any complaint made on his behalf to the court, that his name had been uſed without his aſſent. And the caſe of *Wilkinſon* v. *Colley* (*a*) was referred to, where a receiver appointed by the Court of Chancery for the benefit of infant deviſees, ceſtuy que truſts, was holden to be an agent *lawfully authorized* to give notice to a tenant to quit, and in de-

(*a*) 5 *Burr.* 2694.

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fault to make him liable to pay double rent, within the ſtat. 4 *Geo.* 2. *c.* 28. *ſ.* 1. in an action brought in the name of the truſtee who had been decreed by that court to account, &c.

Gibbs and *Eſpinaſſe* now ſhewed cauſe againſt the rule. The executors, who took this eſtate as joint-tenants under the will (which was admitted), could not act by a majority, but were all bound to join in the notice in order to determine the leaſe under which the defendant claims: and no authority was ſhewn from *Hyrons* to the other two to determine it. [Lord *Ellenborough* C. J. The rule of law is this, as laid down in *Rud* v. *Tucker* (*a*), that every act done by one joint-tenant for the benefit of himſelf and his companion ſhall bind the other; but not thoſe acts which prejudice the other. The only queſtion therefore for conſideration is, whether the giving notice to determine the leaſe, whereby the joint-tenants are to acquire poſſeſſion of the eſtate, be ſuch an act as muſt neceſſarily be a benefit to the third joint-tenant, or whether it may prejudice him?] Then nothing appears from whence the Court can collect whether the determination of the leaſe will be a benefit or a prejudice to *Hyrons*. It is matter of individual judgment reſting in the opinion of thoſe who are to give the notice. If the rent reſerved be an adequate one, and the tenant reſponſible, it might fairly be conſidered by him as prejudicial. And if it be only doubtful, the two joint-tenants have no right to elect for the third. And if on the return of *Hyrons* from abroad he would have a right to diſaffirm the notice, it follows neceſſarily that the defendant could not be bound by it at the time; for the leaſe being entire,

(*a*) *Cro. Eliz.* 803.

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the leſſee was not bound to take notice to quit two-thirds of the eſtate. He is entitled to hold all the premiſes, if bound to hold any of them. Then he is not bound to accept any notice which is not binding upon all his landlords as well as upon himſelf; for it muſt be ſuch as he can with certainty act upon at the time; and therefore if the notice to quit may be diſavowed afterwards by one, no ſubſequent recognition of his can make it good; becauſe in truth it only becomes his notice from the time of the recognition. If the tenant were bound to quit at a certain time by a notice which is binding upon thoſe from whom he derives title, he of courſe would lay out no more upon the premiſes than would ſuffice under his leaſe for the period when his occupation is to ceaſe; whereas if the term were continued for 7 years longer, it might be neceſſary or convenient for him to expend larger ſums, and do other acts within the period between the notice to quit and the expiration of the 14 years, in order to profit by his ſubſequent occupation of the premiſes. Then the notice in this caſe does not even profeſs to ſtate that the two executors had authority from the third to determine the leaſe; but only that they for themſelves and the third give notice, &c. The caſe of *Williams* v. *Corley* (*a*) does not apply; for there the receiver appointed by the Court of Chancery had the authority of that Court for letting the premiſes, and had been acknowledged by the tenant himſelf as acting in the place of the original truſtee, and he had before received rent from the tenant in that character.

(*a*) 5 *Burr.* 2691.

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Erſkine and *Marryat* in ſupport of the rule. The notice to quit purports to be given by the authority of the three executors, and muſt be taken ſo to be, at leaſt till the contrary be proved: more eſpecially when it is followed up by the action of ejectment brought upon the demiſe of the three; which is not merely to be taken as a ſubſequent recognition, (which might be ſubject to the objection taken), but as evidence of a prior authority from the third executor who was abroad. But further, the very nature of the act done furniſhes a preſumption that it is beneficial to the abſent joint-tenant; for it is to put an end to a long leaſe holden at the original rent, and to reſtore to him the poſſeſſion of the eſtate. This is again ſtrengthened by the tenant's reſiſtance to the ejectment; by which he proves his own ſenſe of the benefit of the leaſe to the poſſeſſor of the land, and the benefit of poſſeſſion to the owner muſt be in the ſame proportion. And this is confirmed to be the opinion of the abſent joint-tenant himſelf, by permitting the ejectment to be brought in his name. At any rate, the intereſt of the three executors being apparently the ſame, the Court will not conclude that an act which appeared to be beneficial to the two was prejudicial to the third, without ſome evidence to ſhew ſuch a diſtinction. For all acts done by parties, having a general authority to act on the ſubject matter, muſt be preſumed to have been rightly done until the contrary be ſhewn. Here the notice given on behalf of all three is legal on the face of it, and it lies on the defendant to ſhew that *Hyrons* did not conſent to it in the firſt inſtance, eſpecially againſt the evidence of his having ſince acted upon it, as if it had been iſſued by his authority. Notice to quit given by a ſteward or agent has been always

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deemed ſufficient when the act is adopted and acted upon afterwards by the owner, without proving a particular authority at the time. As in *Fitchet* v. *Adams* (*a*), an entry by a ſtranger, without authority, was holden good to take advantage of a condition broken, if it were aſſented to before the day of the demiſe laid in the declaration in ejectment by the heir at law. [Lord *Ellenborough* C. J. There no third perſon's act was to depend upon the validity of the entry at the time it was ſo made. *Lawrence* J. That caſe goes upon the principle that omnis ratihabitio retro trahitur et mandata æquiparatur. But that cannot apply to a caſe like the preſent, where the tenant was entitled to receive ſuch a notice as he could act upon with certainty at the time.] The tenant could not have been injured if he had acquieſced; for the abſent executor could not have ſhewn that the act done was prejudicial to him.

Lord ELLENBOROUGH C. J. This was a notice to quit given to the tenant under a proviſo in a leaſe for 21 years, that in caſe either party wiſhed to put an end to the term at the expiration of the firſt 7 or 14 years, ſix months previous notice in writing ſhould be given *under* his or *their reſpective hands*. Now this is a notice ſigned by *two* only of *three* joint-tenants, under whom the defendant held, purporting however to be given on behalf of themſelves and the other. It is a notice to defeat an eſtate: the perſon therefore to whom it is given ought to be aſſured at the time he receives it, and when he is to act upon it, that if he deliver up poſſeſſion at the end of the ſix months, he will be acquitted of all further claims in

(*a*) 2 *Stra.* 1128.

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reſpect of the remainder of the term. But if *two* only of the *three* joined in the notice, how could the defendant be aſſured of this? How could he be aſſured that the third might not diſavow the notice afterwards, and claim the defendant ſtill as a tenant to him? But it is ſaid, that *Hyrons* ſuffering the ejectment to be brought in his name is a ratification of the others' authority. But a ratification given afterwards will not do in this caſe; becauſe the tenant was entitled to ſuch a notice as he could act upon with certainty at the time it was given; and he was not bound to ſubmit himſelf to the hazard whether the third co-executor choſe to ratify the act of his companions or not, before the ſix months elapſed. Then the rule of law is relied on to ſhew that the two joint-tenants who ſigned the notice had authority to bind the other in this caſe: and it is aſked how the act appears to be *prejudicial* to the third? But it is not neceſſary for the defendant to ſhew that it would be *prejudicial* to *Hyrons*. The rule of law is, that every act of one joint-tenant which is *for the benefit* of his co-joint-tenant ſhall bind him. And it is a condition on the part of thoſe who ſet it up and would avail themſelves of it as binding, to ſhew that it was *beneficial* to *Hyrons*. For the two joint-tenants had no right to bind the third in his abſence, unleſs the act done appear to have been *for the benefit of all*: and how does that appear? Subſequent acts cannot be brought in aid. It muſt be done under a competent authority at the time. And in order to ſatisfy the condition on which the leaſe was to be defeated, the notice ought to have been given under the reſpective hands of the three executors.

GROSE J. The tenant who took the entire leaſe of the whole was not bound to accept notice to quit a part only, but

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but ſuch notice only as was obligatory upon all the joint-tenants. Here there was a proviſo in the leaſe, that in caſe either party wiſhed to put an end to it at the expiration of the firſt 7 or 14 years, it ſhould be lawful ſo to do upon giving the other ſix months previous notice in writing under his or *their reſpective hands.* That was not done in this inſtance; for the notice was only ſigned by two out of three of the perſons intereſted, and therefore the tenant was not bound by it.

LAWRENCE J. I think there is great weight in the argument of the defendant's counſel, that for the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and not to depend for its validity, in part, upon any ſubſequent recognition of one of them: becauſe the tenant is to act upon the notice at the time, and therefore it ſhould be ſuch as he may act upon with ſecurity. But if it be to depend upon a ſubſequent ratification of one of the joint-tenants, landlords, whether or not it is to be binding upon him, the condition and ſituation of the tenant muſt remain doubtful till the time of ſuch ratification. Now the intention of the parties to the leaſe was, that the tenant ſhould not be obliged to quit without being appriſed of it for a certain time, that he might have an opportunity to provide himſelf with another dwelling; but if a ratification will do, inſtead of 6 months, he might not know certainly for as many days or hours whether he muſt quit or not. The rule of law, that omnis ratihabitio retro trahitur, &c. ſeems only applicable to caſes where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the mean time depend on whether there be a ſubſequent ratification.

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But here the intermediate acts of the tenant referable to the terms of his leaſe are to be affected by relation.

LE BLANC J. I cannot ſatisfy myſelf that the nonſuit was wrong. Here is a power of determining a leaſe by the notice to quit of *three* perſons; and *two* only give the notice: then I muſt be ſatisfied that they had authority to bind the third, before I can ſay that their notice was good. And when I ſee that by the terms of the proviſo the notice is to be given *under their reſpective hands*, I cannot ſay that a notice under the hands of two only is good. Beſides, the tenant is to act upon this notice at the time, and he muſt be ſatisfied that it is ſuch a notice as will bind all the three. No evidence was offered to ſhew that the two acted by the authority of the third; and if the defendant had yielded to it, and could not have proved the concurrence of *Hyrons* to it, the latter might afterwards have diſavowed the act of his co-joint-tenants, and have come upon the defendant for his rent.

Rule diſcharged.

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DOE ex Dem. THOMAS STOPFORD *againſt* ROBERT STOPFORD.

Tueſday, Nov. 27th.

EJECTMENT for the moiety of certain premiſes ſituate at *Dalton* in the county of *Lancaſter*, upon two demiſes for 14 years, one ſtated to be made on the 23d of *April* 1799, and the other on the 25th of *March* 1803. Plea, not guilty. At the trial before *Chambre* J. at the Spring Aſſizes 1804, at *Lancaſter*, a verdict was taken for the plaintiff, ſubject to the opinion of this Court, on the following caſe;

Richard Stopford, being ſeiſed to him and his heirs of an eſtate pur auter vie in the premiſes in queſtion, in *May* 1779 died inteſtate, leaving his widow *Jane*, and an only ſon, *John Stopford*, who thereupon became in like manner ſeiſed of the ſame eſtate. *John Stopford* the ſon had three ſons, *Richard* the eldeſt, *Robert* the defendant, the ſecond, and *Thomas* the leſſor of the plaintiff, the youngeſt, and one daughter. *John Stopford* died ſo ſeiſed in *December* 1779, having by his will dated 1ſt of *December* 1779, and duly executed, deviſed as follows: "Firſt, I direct all my juſt debts, funeral expences, and the probate, &c. of my will to be paid out of my perſonal eſtate; and I deviſe and bequeath all that my meſſuage and tenement, with the lands, &c. in *Dalton* in the county of *Lancaſter*, being leaſehold, under *R. W. B.* Eſq. and now in the occupation of *W. N.* as farmer thereof, unto my ſon *Richard Stopford*, to hold the ſame from and after the deceaſe of

The word *ſhare* may carry a leaſehold eſtate: As where a teſtator, having three ſons and one daughter, and leaſehold eſtate and perſonal funds, deviſed one leaſehold eſtate to his eldeſt ſon, and other leaſeholds to his ſecond ſon, directing his executors to receive and apply the rents until they came of age; and then directed a certain ſum to be put out at intereſt for the benefit of his widow durante viduitate, and that on her death or marriage it ſhould be divided equally between his three ſons, *ſhare and ſhare alike*; and then he gave his daughter 600*l.* to be paid her when of age; and then gave the reſidue of his worldly effects to be divided equally amongſt his three ſons, *ſhare and ſhare* alike; and laſtly directed that "if *any* of his ſaid children died under age and without lawful iſſue, the SHARE of *him* or *her* deceaſed ſhould go equally amongſt his ſurviving ſons:" held, that the word SHARE in the laſt clauſe referring, as it muſt do, to the *whole* ſhare or portion of the daughter, muſt have the ſame meaning as to the ſons, and muſt compriſe the leaſehold as well as perſonal funds before given to them; and that upon the death of the eldeſt ſon under 21, and without iſſue, the leaſehold eſtate deviſed to him went equally between the two ſurviving ſons.

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my mother to him, his heirs, executors, &c. during all the reſidue of my leaſehold eſtate and intereſt therein. And I deviſe and bequeath all that my meſſuage or dwelling-houſe and tenement in *Mawdeſley* aforeſaid, whereat I now live, and the lands, &c. being leaſehold under Sir *R. H.*; and alſo all thoſe my cloſes, &c. called the cloſes on *Blackmoor* in *Mawdeſley* aforeſaid, which I hold by leaſe under the Earl of *Derby*, unto my ſon *Robert Stopford*, to hold the ſame to him, his heirs, executors, adminiſtrators, and aſſigns during all my ſeveral and reſpective eſtates and intereſts therein. Provided that my executors, and their executors and adminiſtrators ſhall hold, manage, and diſpoſe of all and every my ſaid meſſuages, tenements, cloſes, &c. herein before deviſed till ſuch time as my ſaid ſons to whom the ſame are given ſhall reſpectively attain the age of twenty-one years; and till that time diſpoſe of and apply the clear yearly rents, iſſues, and profits therefrom ariſing in manner hereinafter mentioned. And I give and bequeath unto *E. Caunce* and *R. Caſhaw* my executors afternamed, their executors and adminiſtrators, 340*l.* upon truſt that they and the ſurvivor, &c. place the ſame out at intereſt, and out of the yearly intereſt ſhall pay unto my wife *Elizabeth* 15*l.* a-year during her life (durante viduitate), &c. And if the principal ſum of 340*l.* ſhall make more intereſt than 15*l.* yearly, I direct that the overplus, as well as the ſame principal upon my wife's deceaſe or marriage, whichſoever ſhall firſt happen, ſhall go unto and be divided equally amongſt my ſons, *Richard Stopford* and *Robert Stopford*, and my ſon *Thomas Stopford*, their reſpective executors and adminiſtrators, *ſhare and ſhare alike*. And I give and bequeath to my daughter *Jane Stopford*, her executors and adminiſtrators, 600*l*, to be paid her as ſoon as ſhe ſhall

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attain the age of twenty-one years. And all the reſt, reſidue, and remainder of my worldly effects not herein before diſpoſed of, I give deviſe and bequeath to my ſaid three ſons *Richard*, *Robert*, and *Thomas*, to be divided equally amongſt them, their reſpective executors and adminiſtrators, *ſhare and ſhare alike*, when and as ſoon as they ſhall attain the age of twenty-one years. And I direct that the profits and produce of my real and perſonal eſtates ſhall be applied towards bringing up my ſaid children till of age. And I further direct, that if any of my children die under age, and without lawful iſſue, the SHARE of *him* or *her* deceaſed ſhall go equally amongſt my ſurviving ſons. And I hereby conſtitute and ordain the ſaid *E. Caunce* and *R. Cuſhaw* my joint executors, &c." *Jane Stopford*, the mother of the teſtator *John Stopford*, died in *July* 1781. *Richard Stopford*, the deviſee of the premiſes in *Dalton* mentioned in the will, died in *Auguſt* 1785, at the age of ſixteen years, intestate, and without iſſue. From the teſtator's death until the defendant *Robert Stopford*, the next brother and heir at law of *Richard Stopford* the deviſee came of age, the executors were in the receipt of the rents, iſſues and profits of the premiſes deviſed to *Richard Stopford*; ſince which the defendant, *Robert Stopford*, has had the poſſeſſion of them. The lives upon which the eſtate is held are ſtill in being. This action is brought by the leſſor of the plaintiff *Thomas Stopford*, being the youngeſt ſon of *John Stopford* the teſtator, who attained his age of 21 years on the 22d of *April* 1799, to recover the moiety of the ſaid leaſehold eſtate in *Dalton*, to which moiety he lays claim by virtue of his father's will. The queſtion for the opinion of the Court was, whether upon the conſtruction of the will of *John Stopford*, the leſſor of the plaintiff has become entitled to a moiety of the ſaid leaſehold eſtate?

If

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If the Court ſhould be of opinion that he is, then the verdict to ſtand; if not, then a verdict to be entered for the defendant.

This caſe was argued in *Trinity* term laſt by *Holroyd* for the plaintiff, and *Scarlett* for the defendant, who ſeverally commented upon the different clauſes of the will. The former contended, that in the concluding deviſe in the will, wherein the teſtator directs, that "if any of his children die under age, and without lawful iſſue, the SHARE of him or her deceaſed ſhould go equally amongſt his ſurviving ſons," the word SHARE was intended to carry the leaſehold property ſpecifically deviſed to the two eldeſt ſons reſpectively, in caſe of the death of either before 21, &c. as well as the perſonal funds before bequeathed to them. The latter contending, that the meaning of the word *ſhare* muſt be limited to the reſidue of the perſonal funds only, of which there was ſufficient to ſatisfy it, according to its ordinary conſtruction, and the ſenſe in which it was uſed in other parts of the will. And he intimated that the Maſter of the Rolls had once been of this opinion, when the ſame parties were before him, upon the conſtruction of this will. But in reply it was ſtated, that his Honor had afterwards entertained doubts on the ſubject, and that *Chambre* J., before whom this ejectment was tried, had finally been of opinion with the leſſor of the plaintiff.

The Court then ſaid, it would be proper for them to conſider the caſe more deliberately before they delivered their opinion upon it. And now

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

The

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The queſtion, whether the leſſor of the plaintiff, the youngeſt ſon, be entitled to a moiety of the leaſehold eſtates deviſed to *Richard Stopford*, the eldeſt ſon of the teſtator, in the event which has happened of *Richard*'s death under age and without iſſue, depends upon the meaning of the word *ſhare* in this part of the will. Its ſenſe, as that of every other word capable of ſeveral diſtinct meanings, is properly to be collected from the context in the place where it occurs. In another part of the will, i. e. where the 340*l.*, and the overplus of intereſt after paying thereout 15*l.* a-year to the teſtator's wife is ſpoken of, and directed to be divided equally amongſt his three ſons and their reſpective executors and adminiſtrators *ſhare and ſhare alike*, the word *ſhare* neceſſarily means an equal proportion of a *perſonal* fund to be divided amongſt them. In the bequeſt of the reſidue of his worldly effects to his ſons and their reſpective *executors and adminiſtrators*, it means in like manner an equal proportion of a *perſonal* fund. In the laſt inſtance in which the word *ſhare* occurs, (which is the inſtance in queſtion), after having directed that the profits and produce of his real and perſonal eſtate ſhould be applied towards the bringing up his ſons till of age, the teſtator orders that if *any of his children* ſhould die under age without lawful iſſue, "the *ſhare* of him or *her* deceaſed ſhould go equally amongſt his ſurviving ſons." Here the "*ſhare* of *her deceaſed*" can mean only the entire fortune or portion before given to the daughter under her father's will, i. e. her 600*l.*, for ſhe had no participation with her brothers under the will either in the legacy of 340*l.* and the contingent overplus of intereſt thereupon beyond the 15*l.* a-year given thereout to the wife, nor in the reſidue of worldly effects. If therefore the word *ſhare* can only

mean

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mean (as it only can) in reſpect to the daughter *her entire portion or ſhare aſſigned her under the will*, it is reaſonable to give it the ſame meaning in the ſame place in reſpect to the ſons, unleſs the intention of the teſtator to be collected from any other part of the will, or ſome rule of law, ſhould be contravened thereby. But neither of theſe effects follow from giving this conſtruction to the word *ſhare* as applied to the ſons' intereſts under the will. It occaſions indeed, what may be attended with ſome inconvenience, (and a wiſh to avoid which, and a probably preſumed intention in the teſtator on that account, inclined me at firſt to a different conſtruction) i. e. the neceſſity of dividing what is an entire tenement as between the lord and tenant, between two ſurviving ſons, as ſeveral tenants of their reſpective ſhares of the ſame: an inconvenience, in reſpect to the payment of rent, contribution to fines of renewal, and the like, which as far as it exiſts, the teſtator had in the firſt inſtance ſteered clear of, by giving the ſeveral holdings entire to each of his ſons to whom he devi'ed the ſame. But upon conſideration I do not feel that this circumſtance can weigh againſt the otherwiſe clear and neceſſary meaning of the word *ſhare* as it occurs in this place. We are therefore of opinion that the leſſor of the plaintiff, the younger brother, is under this word *ſhare* entitled to a moiety of the leaſehold eſtate for lives, which was in the firſt inſtance deviſed to his brother *Richard*; and that the whole thereof does not deſcend to *Robert*, the elder of the two brothers, as heir at law of *Richard*: and of courſe that the verdict in favour of the plaintiff for ſuch moiety ought to ſtand.

Poſtea to the Plaintiff.

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NICHOLSON and Another *againſt* WILLAN and Another.

Tueſday, Nov. 27th.

THIS was an action on the caſe againſt the defendants as common carriers, wherein the firſt count of the declaration ſtated, that the plaintiffs, on 20th *Feb.* 1803, at *Nottingham*, cauſed to be delivered to the defendants, and the defendants then and there accepted of the plaintiffs certain goods of the plaintiffs of a certain value, viz. 100*l.*, to be by the defendants carried by the *London* and *Leeds* royal mail coach, which was to depart in the ſame morning from *Nottingham*, to be delivered to the plaintiffs for certain reaſonable hire to be paid to the defendants on that behalf: and that although the ſaid mail coach did on the morning of the day and year aforeſaid depart from *Nottingham* for *London*, yet the defendants, not regarding their duty, &c. inſtead of carrying the ſaid goods by the ſaid mail coach, or delivering the ſame goods in *London*, &c. wrongfully, and without the licence and againſt the will of the plaintiffs, carried the ſaid goods from *Nottingham* by a different coach, not being a mail coach, and took ſuch bad care of the ſaid goods that they were loſt, &c. The ſecond count ſtated a general contract to carry the goods from *Nottingham* to *London*, and that they were loſt by negligence. The third count ſtated a ſpecial delivery to and acceptance of the goods by the defendants, to be carried from *N.* to *L.* by the mail coach, or if not ſent by the mail coach, then to be re-delivered to certain perſons at *N.* for the uſe of the plaintiffs; and then averred a breach of that contract by not ſending the goods by the mail and detaining them from thoſe perſons at *N.*, and afterwards

Where one delivered goods of *above* 5*l.* *value* to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner the carriers had declared they would not be accountable for any package *above the* value of 5*l.*, UNLESS inſured and paid for accordingly: held, that the goods having been ſent by a different carriage and loſt, the owner could not recover the value againſt the carriers; for the loſs happened by no tortious converſion nor by a renunciation of their character as common carriers, but only by a negligent diſcharge of their duty as ſuch. Nor could he recover even the 5*l.*, as by the terms of the notice the carriers ſtipulated not to be anſwerable at all for goods above 5*l* value, unleſs paid for accordingly.

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afterwards loſing the goods by negligence. The fourth count ſtated a general contract by the defendants to take care of the goods for a certain reward, and that by their negligence the goods were loſt. The fifth was a count in trover. Plea not guilty. At the trial before Lord *Ellenborough* C. J. at the Sittings after laſt term at *Guildhall*, it appeared that the defendants were proprietors of two coaches travelling from *Leeds*, through *Nottingham*, to *London*, the one a mail coach, the other a heavy coach, which went out ſix hours later every day than the other. The parcel in queſtion, containing goods to the value of 58*l.* was (as a witneſs for the plaintiffs proved, and which the jury found to be true,) *delivered and accepted to be carried by the mail coach.* It appeared however to have been booked to go by the heavy coach, and to have been afterwards loſt, but whether in a courſe of conveyance by the heavy coach, or out of the warehouſe, or how otherwiſe did not appear. It was proved that the defendants had for ſome time before put up an advertiſement on a board in their office at *Nottingham*, and of which the plaintiffs were alſo proved to have had notice, in the following terms: "Take notice, that the proprietors of coaches tranſacting buſineſs at this office will not be accountable for any paſſengers' luggage, money, plate, jewels, watches, writings, goods, or *any package whatever* (if loſt or damaged) *above the value of* 5l., UNLESS inſured and paid for at the time of delivery, and demanded in one month after ſuch damage was ſuſtained." (Signed by one of the defendants.) The jury found a verdict for the plaintiffs for 5*l.*, ſubject to the queſtion which was reſerved by his Lordſhip for the opinion of the Court, whether the verdict ſhould ſtand for that ſum, or be entered for 58*l.*, the value of the

goods, or whether a nonſuit ſhould be entered. A rule nisi having been obtained in the laſt term for entering a nonſuit,

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Erſkine and *Cowley* ſhewed cauſe againſt it, and contended, 1ſt, that the plaintiffs were entitled to recover the whole value of the goods, as upon a breach of the ſpecial contract laid in the firſt count, whereby the defendants, after contracting to ſend the parcel by the *mail*, had ſent it by another coach. The giſt of that contract was, that the goods ſhould be ſent by a particular mode of conveyance, which the plaintiffs might think was more ſafe as well as expeditious than any other, and would on that account be content to ſtand their own inſurer againſt any loſs beyond the 5*l.* which the defendants at all events engaged to make good. The defendants do not in their notice object to *carry* for the ordinary price goods above 5*l.* in value, but they ſtipulate that they will not *inſure* them from loſs above 5*l.* for that conſideration: by this muſt neceſſarily be underſtood loſſes ariſing from accident or misfortune, which as common carriers they would otherwiſe be liable to anſwer for at common law, and not ſuch as ariſe from their own wilful misfeazance. Their liability then ariſes, not from any implied negligence in the execution of the contract for carrying, but from actual miſfeazance in doing an act which put it out of their own power to perform their contract in the manner ſtipulated. If the goods had been ſent by the mail and loſt, the defendants would ſo far have performed their contract within the terms of the notice, that at moſt they would not have been anſwerable for above 5*l.*: but here there was no inception of the contract of carriage by the mail. The breach of contract therefore is collateral to the notice, and

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the ſame as if the defendants had thrown the parcel into the ſtreets, where it was loſt or deſtroyed. As in *Ellis* v. *Turner* (*a*), a carrier having carried the goods beyond the place where he had ſtipulated to leave them, after which they were loſt, it was ruled to be a caſe out of his general notice not to be liable beyond 10*l.* per cent., and that he was liable to pay the whole loſs. A pawnee (*b*) is not liable if the goods be ſtolen without his default; but if they be taken from him while uſing them contrary to his contract, he loſes his privilege. But, 2dly, it is not competent to common carriers, ſuch as the defendants are, to limit their common law liability by means of general notices. If their reward be not adequate to their riſk, they ſhould accept ſpecially (*c*) in each caſe at a rate proportioned to the value of the goods. Carriers have been for ſome years gradually encroaching on their general legal reſponſibility, and extending from time to time their exemptions till the policy of the common law is entirely defeated. In *Gibbon* v. *Paynton* (*d*), where ſuch notices were firſt conſidered, the exception was only of *money, jewels*, or other like valuables, for carrying which a certain higher rate was demanded. The plaintiff there ſent money hid in an old bag of hay; and held that he could not recover for the loſs of the money, becauſe it was a *fraud* upon the carrier. Now the exceptions extend to all goods whatever. In *Doct. & Stud.* 270. *Dial.* 2. *c.* 38. after ſpeaking of the general liability of a carrier, it is added, "and if he would per caſe refuſe to carry goods unleſs promiſe were made uuto him that he ſhall not be charged

(*a*) 8 *Term Rep.* 531. (*b*) *Coggs* v. *Bernard*, 2 *Ld. Ray.* 917.

(*c*) *Kenrig* v. *Eggleſton*, *All.* 93. *Morſe* v. *Slue*, 1 *Vent.* 238. *Tirlebarne* v. *White*, 1 *Stra* 145.

(*d*) 4 *Burr.* 2298.

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for no misdemeanor that should be in him, the promise were void; for it were against reason and good manners." The same thing is said in *Noy's Maxims*, 92. And this doctrine was lately confirmed by Lord *Kenyon* in *Hide* v. *The Proprietors of the Trent and Mersey Navigation* (*a*), who said, that common carriers could not discharge themselves from losses by any act of their own, as by giving notice.

Garrow and *Wigley* contrà. The goods were delivered to and accepted by the defendants in their character of carriers, and the notice which applies as well to the mail as the heavy coach, and was communicated to the plaintiffs, amounts to a special acceptance on the part of the carriers, which the authorities prove may legally be made. Then however an indictment or action might have lain against them for refusing to accept the goods otherwise than specially, yet having so accepted them, they can only be liable on their special contract. If the goods had been lost immediately after such acceptance, the defendants certainly could not have been charged further than the terms of the notice warranted: then it cannot make any difference that they were lost in the progress of their carriage out of the heavy coach. Now by the terms of the notice the defendants expressly refuse to make good at all the loss of goods of the value of more than 5*l.* (as these confessedly were), *unless* insured and paid for accordingly. The plaintiffs therefore, if bound by the terms of the notice, are not entitled to recover even the 5*l.*, as was ruled in *Izett* v. *Mountain* (*b*). For upon the first count, the plaintiffs fail in proving their allegation that the defendants *accepted* the parcel upon

(*a*) 1 *Esp. N. P. Cas.* 35. (*b*) 4 *East*, 371.

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the terms there ſtated, which are not conſonant to the terms of the notice; and this applies to all the other counts ſtating a contract; and the fifth count in trover cannot at any rate be maintained, without ſhewing a wilful and tortious act, by which the loſs happened; of which there is no evidence. For at the moſt, the ſending them by a different coach was no more than an act of negligence: they ſtill acted in their character of common carriers.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. in this term delivered the judgment of the Court; and after ſtating the ſeveral counts in the declaration, and obſerving that as there was no evidence applicable to an alternate contract of the kind laid in the third count, that count may be laid out of the queſtion; and alſo ſtating the ſeveral facts proved at the trial in the manner before ſet forth; proceeded thus:

On the part of the plaintiffs it was contended that they were entitled to recover the 58*l.* the value of the goods, notwithſtanding the notice given by the advertiſement, which excludes from the carriers' general reſponſibility for the ſame at common law all goods above the value of 5*l.* unleſs the terms therein ſpecified, namely, of inſuring and paying for the goods at the time of delivery, ſhould be complied with, and which was not done in this inſtance. The ground on which they ſo contended was that the loſs in queſtion was one not incurred in the courſe of their employment as carriers, but occaſioned by an act of tortious converſion in direct contravention of the terms on which the goods were delivered to and accepted by them. But to found this argument there was

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no other evidence but the mere fact of the booking of the goods for a different coach, and a ſubſequent non-delivery, which can amount to no more than a negligent diſcharge of duty in their character of carriers, and not to an entire renunciation of that character and of the duties attached to it, ſo as to make them guilty of a diſtinct tortious miſfeazance in reſpect to the goods in queſtion.

It was alſo contended on the part of the plaintiffs that ſuch a ſpecial acceptance of goods by a common carrier as is contained in the defendants' notice is contrary to the policy of the common law, which has made common carriers reſponſible to an indefinite extent for loſſes not occaſioned by the only excepted cauſes of loſs, viz. "the "act of God and the King's enemies." But conſidering the length of time during which, and the extent and univerſality in which the practice of making ſuch ſpecial acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the obſervation and with the allowance of courts of juſtice, and with the ſanction alſo and countenance of the legiſlature itſelf, which is known to have rejected a bill brought in for the purpoſe of narrowing the carriers' reſponſibility in certain caſes, on the grounds of ſuch a meaſure being unneceſſary, in as much as the carriers were deemed fully competent to limit their own reſponſibility in all caſes by ſpecial contract: conſidering alſo that there is no caſe to be met with in the books in which the right of a carrier thus to limit by ſpecial contract his own reſponſibility has ever been by expreſs deciſion denied: we cannot do otherwiſe than ſuſtain ſuch right in the preſent inſtance, however liable to abuſe and productive of inconvenience it may be; leaving to the legiſlature if it ſhall think fit

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to apply such remedy hereafter as the evil may require. In the absence therefore of any evidence to support the plaintiffs' claim as founded upon a supposed tortious conversion of the goods in question, and of any valid objection in point of law to the special terms of acceptance contained in the defendants', the carriers', notice, we cannot help giving effect to those terms in the notice; by which, inasmuch as the goods in question were above the value of 5*l.* and not insured and paid for at the time of delivery, the plaintiffs are not accountable for the same: and of course the verdict even for the 5*l.* must be set aside, and a nonsuit entered.

A nonsuit entered.

Tuesday, Nov. 27th.

WYNNE and Another *against* RAIKES and Others.

A letter from the drawees of a bill in *England* to the drawer in *America*, stating that "their prospect of security being so much improved they shall *accept or certainly pay* the bill," is an *acceptance* in law, although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in *England*, and again after the writing such letter refused payment of it when presented for payment; and although such letter written before were not received by the drawer in *America* till after the bill became due.

THE first count of the declaration stated, that on the 9th of *November* 1801 *Aquila Brown* drew a bill of exchange on the defendants for 500*l.* payable to the order of *Thomas Andrews* and *Butler* at 60 days sight; that *Thomas Andrews* and *Butler* indorsed the said bill to the plaintiffs; and that the defendants upon sight thereof, duly accepted the bill. There were also counts for money paid, and for money had and received. The defendants pleaded the general issue, and at the trial before Lord *Ellenborough* C. J. at the sittings after last *Hilary* term at *Guildhall*, a verdict was found for the plaintiffs for 555*l.* subject to the opinion of this Court on the following case:

On the 9th of *November* 1801 *Aquila Brown*, who resides at *Baltimore*, in *North America*, drew the bill of exchange in question at that place upon the defendants, who reside in *London*, and for a valuable consideration

paid

paid the bill to *Thomas Andrews* and *Butler*, reſiding in *Baltimore*, who afterwards, for a valuable conſideration indorſed it to the plaintiffs, who reſide in *London*. On the 9th of *November* 1801 *Aquila Brown*, by letter of that date, adviſed the defendants of having valued on them by divers bills amounting together to 5548*l.* 14*s.* 2*d.* ſterling, of which the bill in queſtion was one, the amount of which bills *Aquila Brown* in that letter *requeſted the defendants to honour with acceptance*, and place the amount to his debit, and which letter of advice was duly received by the defendants. The plaintiffs, on receiving the bill in queſtion in *England*, preſented it on the 2d of *January* 1802 to the defendants for their acceptance, but the defendants refuſed to accept it. On the 13th of *January* 1802 the defendants wrote a letter to *Aquila Brown*, the drawer, which letter, after mentioning ſome damage which the cargo of the *Cheſapeak*, conſigned to the defendants, had ſuſtained, and difficulties in which it had been involved; as alſo an attachment laid upon the property of *Aquila Brown* in the hands of the defendants, (among other things) contains the following paſſages: "Under theſe circumſtances, while your property in the *Cheſapeak* appeared in ſo very queſtionable a ſtate that we could not tell what ſecurity to reſt upon it, you could not expect that we could interfere for any of your bills refuſed by Mr. *Mangin*, or even accept all the bills of yours which came in upon us. Several of them of courſe have been noted for non-acceptance, and Meſſrs. *Finlay*, *Bannatyne*, and Co. have officiouſly ſent you a proteſt on that for 551*l.* 15*s.* for non-acceptance. We have however now the ſatisfaction to mention to you that Mr. *Mangin*, having reſolved to pay many of your bills on him, Meſſrs. *Melliſh* and Co. have taken off the attach-

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ment in our hands, and ſince the receipt of Meſſrs. *Muilman*'s letter of the 5th inſtant, our proſpect of ſecurity on the *Cheſapeak* is ſo much improved that *we ſhall accept or certainly pay all the bills* which have hitherto appeared; the one for 6500*l.*, the 19th of *October*, has not yet been preſented to us, but we will hope that the ſtate of your funds will likewiſe permit us to take care of that." The bill in queſtion was one of thoſe which had appeared prior to the writing the above letter of the 13th *January* 1802, and which letter was *received by Aquila Brown* in *America* on the 19th *March* 1802. On the 6th of *March* 1802, which was 60 days and three days of grace after the bill in queſtion was preſented for acceptance, the plaintiffs preſented the bill to the defendants for payment; but the defendants refuſed to pay the ſame, and the plaintiffs cauſed it to be proteſted for non-payment. *Aquila Brown*, the drawer of the bill, was at the time the ſame was drawn indebted to the defendants in the ſum of 5000*l.* and hath ſo continued to the preſent time. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court ſhould be of that opinion, the preſent verdict to ſtand; if otherwiſe, a nonſuit to be entered.

Littledale, for the plaintiffs, relied on the caſe of *Clarke* v. *Cock* (*a*) as in point to ſhew not only that an acceptance of a bill may be by parol or collateral writing, but alſo that the terms of the defendants' letter of the 13th of *January* 1802, wherein they ſtate "that the proſpect of ſecurity in the *Cheſapeak* was ſo much improved that they *ſhall accept or certainly pay* all the bills" which had then appeared, did in law amount to an acceptance. In

(*a*) 4 *Eaſt*, 57.

that

that caſe the acceptance was by letter to the drawer, acknowledging notice of the bill having been drawn, and aſſuring him that it would meet with due honour from him. The only difference between the two caſes is, that here the letter of the defendants was not communicated to the plaintiffs before the bill became due. But however material that might have been if the letter were to be conſidered merely *as a ſpecial agreement* to accept or pay the bill, it matters nothing conſidering it as in itſelf a legal *acceptance* of the bill; which is a technical term, binding the acceptor equally into whoſever hands the bill ſhall come, and not merely confined in its operation to the particular perſon to whom the promiſe was made, or any other to whom it may have been communicated previous to the bill becoming due. If the promiſe to accept, ſo made, were to be conſidered only as a ſpecial agreement, the liability of the acceptor would be continually varying, according as the bill got into this or the other perſon's hands, who had or had not notice of the ſpecial agreement, and who had or had not taken the bill upon the credit of it. According to the known practice and law of merchants, it is ſufficient to fix the acceptor abſolutely, if his promiſe to pay be made to the drawer, who is the fountain-head of the bill, or to the firſt indorſer by whom it is put into circulation. When the letter had once paſſed out of the defendants' hands, it had its operation, and they had no further concern with the bill than to pay it when due. In the caſe of *Powell and Another* v. *Monnier* (*a*) the plaintiffs, indorſees, had received the bill before the letter of *Monnier* to the drawer, promiſing that the bill ſhould be duly honoured, was written, and which was holden to be an acceptance. The plaintiffs

(*a*) 1 *Atk.* 611.

therefore

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therefore could not have taken the bill on the credit of the letter. So in *Pierſon* v. *Dunlop* (*a*) there was a prior refuſal to accept given to the holder, as in this caſe; yet a ſubſequent letter to the drawer, ſaying that his bill would receive due honour was conſidered as an acceptance: and ſome expreſſions to the contrary, attributed to Lord *Mansfield* in one part of his judgment, were noticed by Lord *Ellenborough* in *Clarke* v. *Cock* (*b*), as claſhing with what was ſaid by the ſame noble judge in *Pillans* v. *Van Mierop* (*c*), and with other authorities.

Puller, contrà, at firſt propoſed to queſtion whether the letter of the 13th of *January* did amount to a poſitive promiſe to pay the bill even as between the drawer and acceptors: but finding the opinion of the Court decidedly againſt him on that point, he proceeded to diſtinguiſh this from the other caſes, by obſerving that here the defendants had expreſsly refuſed to the holders, the plaintiffs, to *accept* the bill, and they followed up ſuch refuſal, after writing the letter of the 13th of *January* to the drawer, by denying payment. That letter, therefore, can only be taken to be a private engagement to the drawer to *pay* the bill when it became due, upon the ſuppoſition that they ſhould then have funds of his in their hands, but accompanied with a direct *refuſal to accept* the bill, ſo as to make themſelves liable upon it in the hands of a third perſon. The promiſe to pay to the drawer never reached him in *America* till after the bill had become due and had been refuſed payment. It could not then have any operation. In order to have effect it muſt have relation to an exiſting bill, according to *Johnſon* v. *Colt*

(*a*) *Cowp.* 571. (*b*) 4 *Eaſt*, 70. (*c*) 3 *Burr.* 1663—9.

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ings (*a*); and it cannot vary the case whether the promise be made before the bill is drawn, or after it is due and has been refused payment, when the operation of it is spent. In *Beawes' Lex Mercatoria* 454. *pl.* 16. it is said that "if the possessor of the bill hath neglected to demand acceptance before the drawer's failure, and the person to whom it is directed has advice thereof, he cannot be compelled to accept the draft, *though previous to the knowledge of the drawer's misfortunes he had acquainted him with his intention to honour his bill.*" As to the case of *Powell* v. *Monnier*, the defendant, after giving the drawer the promise to accept, kept the bill in his hands ten days previous to the time when it became due, without objection, and then returned it to the indorsees; and for several days after he had so received it the drawer continued solvent; by which laches the acceptor clearly made the bill his own. [Lord *Ellenborough* C. J. It does not appear by the report that that formed any part of the ground of Lord *Hardwicke*'s decision. He went on the ground that the letter was an acceptance.] Here the letter never reached the drawer till after the bill had become due and was refused payment; so that it could not possibly have influenced any person to take the bill. And it is on this ground that a collateral promise to accept was considered by Lord *Mansfield* in *Mason* v. *Hunt* (*b*) as constituting an acceptance. And this was confirmed by *Le Blanc*, J. in *Johnson* v. *Collings* (*c*). Here however the possibility of the promise influencing any third person is negatived by the circumstances of the case.

(*a*) 1 *East*, 98. (*b*) *Dougl.* 299. (*c*) 1 *East*, 105.

Littledale

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Littledale in reply, obſerved, that the payees in *America* would act upon the letter when received, and therefore it would influence the conduct of third perſons.

The Court conſidered the caſe of *Powell* v. *Monnier* to be in point to the preſent; but as it went ſomewhat further than the other caſes, they wiſhed to ſee if there were any other report of it varying from that in *Atkyns*. Upon this day

Lord ELLENBOROUGH C. J. delivered judgment.

This caſe, in all its material circumſtances, reſembles that of *Powell* v. *Monnier*, 1 *Atk.* 611., the authority of which has not been, as far as we have been able to find, ever ſhaken. The letter of the defendants, ſtated in the caſe to have been written on the 13th of *January* 1802 to *Aquila Brown*, the drawer, when the bill in queſtion, amongſt others drawn by him upon them, had been refuſed acceptance, after commenting upon the circumſtances which had before made the property of the drawer appear to them, the defendants, to be in a very queſtionable ſtate, particularly in reſpect to what the drawer had in the *Cheſapeak*, ſays, "Our proſpect of ſe-"curity in the *Cheſapeak* is ſo much improved that *we ſhall* "*accept* or *certainly pay* all the bills which have hitherto "appeared." And the firſt queſtion in this caſe is, Whether this promiſe be an *acceptance?* If either branch of the alternative contained in this promiſe would be an effectual acceptance, if ſtanding alone, ſurely it cannot be leſs ſo becauſe the promiſe is couched in terms of an alternative of which each branch is an acceptance. A promiſe *to accept* an exiſting bill is an acceptance. A promiſe

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miſe *to pay it* is alſo an acceptance. A promiſe therefore to do the one or the other, *i. e. to accept* or *certainly pay*, cannot be leſs than an acceptance. It amounts, I think, in effect to this, "Whether we ſhall ſend for the bill "again, and accept it in form or not, is uncertain, but "at any rate you may depend upon its being paid." Suppoſing it to be an acceptance, the time when it is to be conſidered as made, namely, Whether at the date of the letter, or at the time when it reached the drawer to whom it was written in *America*, (which was on the 19th of *March* 1802, after the bill had become due), is immaterial, inaſmuch as an acceptance after the time appointed for the payment of a bill is good. (*Jackſon* v. *Piggot*, 1 *Ld. Raym.* 364. *Salk.* 127. and *Mutford* v. *Walcot*, 1 *Ld. Raym.* 574. *Salk.* 129, &c.)

The ſecond queſtion is this caſe is, Whether, inaſmuch as the bill was not taken by the holders upon the credit of this promiſe of the defendants ſo made to the drawers, nor was the ſame known to them to have been made at all till after the bill was due, they, the holders, can avail themſelves of it as an acceptance? In the caſe of *Powell* v. *Monnier*, already mentioned, that which was holden an acceptance enuring to the benefit of the indorſees, the the plaintiffs, was an acceptance contained in a letter to the drawer, one *Newburgh*, promiſing, "that his bill "ſhould be duly honoured." The promiſe, being long ſubſequent to the time when the plaintiffs in that caſe became poſſeſſed of the bill by indorſement, could of courſe have formed no part of their original inducement to take it. And the promiſe was in that caſe, as well as in this, made to a drawer, who had drawn without having any effects in the acceptor's hands; and it does not appear in the one caſe more than in the other that the holders,

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holders, the plaintiffs, ever knew of the acceptance on which they afterwards relied prior to the time when the bill became due. Without overſetting the authority of the caſe of *Powell* v. *Monnier*, we cannot ſay that the plaintiffs are not in the preſent caſe, which ſo entirely reſembles it, entitled to recover. And as in adhering to it we violate no principles of commercial convenience, but confirm a rule of law, which we find eſtabliſhed on a ſubject which leaſt of all others endures uncertainty and change, we cannot do otherwiſe than hold the plaintiffs in this caſe entitled to recover.

Poſtea to the plaintiffs.

Saturday, Nov. 27th.

DOE on the Demiſe of WHITBREAD *againſt* ANN JENNEY, Widow.

Where a copyholder in fee who had paid a fine on his original admittance, ſurrendered to the uſe of himſelf for life, remainder to his wife for life, remainder over; on which ſurrender and readmittance no new fine was paid; and by the cuſtom a remainder-man coming into poſſeſſion on the death of tenant for life muſt be admitted and pay a fine: held, that ſuch a cuſtom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay her fine, after proclamations made and preſentment by the jury, the lord may ſeize quouſque the tenant comes in, and maintain ejectment to recover the poſſeſſion in the mean time. And ſuch proclamations being in general terms for *any* perſon to come in and make title, &c. and the preſentment of default being alſo general, are good, though the perſon next in remainder were known and named in the ſurrender.

THIS was an ejectment to recover certain copyhold premiſes, parcels of the manor of *Uſford*, with the members, in the county of *Suffolk*, which was tried before *Hotham* B. at the laſt aſſizes at *Bury*, when a verdict was found for the plaintiff, ſubject to the opinion of this Court on the following caſe:

In 1787 the leſſor of the plaintiff purchaſed and became, and is now lord of the manor of *Uſford*, and the lands in queſtion are parcel of this manor. In 1749 *Edmund Jenney* was admitted in fee to the lands in queſtion; upon whoſe admiſſion a full fine was paid. On the 4th of *September* 1765 he ſurrendered the lands to the uſes of his marriage ſettlement, viz. to the uſe of himſelf for life, remainder to the defendant, then *Ann Brock*, ſpinſter, for

life,

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life, with divers remainders over. On the 10th of *April* 1766 *E. Jenney* was admitted tenant of theſe lands, to hold to himſelf for life, "according to the form and effect of the ſaid ſurrender by the rod, at the will of the lord, according to the cuſtom of this manor, by the rents and ſervices therefore due and of right accuſtomed, ſaving every perſon's right." No fine was paid by *E. Jenney* on his admiſſion in 1766, as tenant for life under the marriage ſettlement, or aſſeſſed or paid in reſpect to the remainders. In *Auguſt* 1801 *E. Jenney* the tenant for life died, and the defendant was called on to be admitted; and thereupon ſhe appeared at a court baron of the manor on the 3d of *December* 1801, and offered to ſwear her fealty or have it reſpited; but ſhe refuſed to be *admitted*, inſiſting at the ſame time that ſhe was the lord's tenant by virtue of the ſurrender and admittance of *E. Jenney*, the prior tenant for life. On this refuſal there was a preſentment by the homage that *E. Jenney* died ſeiſed; and three proclamations were made at three different courts that if *any* perſon or perſons would come into court and make any juſt claim or title in or to all or any of the lands or tenements holden of the ſaid manor, whereof the ſaid *E. Jenney* died ſeiſed, ſuch perſon or perſons ſhould come into court and take admiſſion to the ſame. And no one coming in to be admitted, a precept was iſſued by the ſteward of the manor under his hand, and dated the 11th of *December* 1802, directed to the bailiff of the manor, authoriſing him in the preſence of two or more copyhold tenants of the manor to ſeize into the hands of the lord, quouſque the tenant ſhould come in to be admitted, all ſuch copyhold lands and tenements holden of the ſaid manor by copy of court roll, whereof the ſaid *E. Jenney* died ſeiſed, as aforeſaid, to and for the

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uſe of the lord, quouſque the tenant comes in to be admitted: and then the lands are ſpecified under a videlicet. And the lands were accordingly ſeized by the bailiff into the hands of the lord, in the preſence of two copyhold tenants of the manor quouſque the tenant ſhould come in to be admitted. And after ſuch ſeizure the lord made the leaſe in queſtion, on which the preſent ejectment is brought. And the jury found, that by the cuſtom of the manor, when a perſon who has been admitted tenant for life of a copyhold eſtate holden of the manor dies, the tenant in remainder, whether for life, in tail, or in fee, ſhall come in to be admitted and pay a fine thereupon. And they alſo found a verdict for the plaintiff, ſubject to the opinion of the Court on the following queſtion, viz. Whether, under theſe circumſtances, the plaintiff in the ejectment were entitled to recover the lands in queſtion.

Alderſon for the plaintiff, made two points; 1ſt, That, independent of the cuſtom, the defendant, next in remainder after the death of the tenant for life, was bound, upon his death, to come in and be admitted. But, 2dly, That at any rate ſhe was ſo bound by the cuſtom, which was a good one. 1. The admittance of tenant for life is ſo far only the admittance of thoſe in remainder as to veſt their eſtate; but not ſo as to prejudice the lord in reſpect of his fine on admiſſion. The ſtatute of limitations, however comprehenſive the terms of it, and binding on copyholders, extends not to bar the lord of his fine (*a*). So the ſtat. 16 *R.* 2. *c.* 5. which made it a forfeiture of land generally to purchaſe bulls of the pope, does not attach on copyholds, becauſe that would prejudice the

(*a*) Vide 1 *Bac. Abr.* 711. in margine.

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lord (*a*). The rule for theſe expoſitions is given in *Bacon's Abridgment* (*b*), that where an act of parliament by general words alters any eſtate, intereſt, tenure, cuſtom, or ſervice of a manor, or does any thing in prejudice either to the lord or tenant, it ſhall not extend to copyhold eſtates; but otherwiſe where the act is made for the public good, and no prejudice accrues to the lord or tenant. So neither ſhall the general rule of law, that the admittance of the tenant for life is the admittance of all in remainder, extend to deprive the lord of his fine due on the admiſſion of each individual tenant. But as the fine is only due to the lord on the admiſſion of the tenant, if the remainder-man were not bound to come in and be admitted on the death of tenant for life, the lord would be deprived of his fine. Lord *Coke* (*c*) therefore lays down the general rule with this limitation, that "if a copyhold be ſurrendered for life, remainder to a ſtranger; though the admittance of tenant for life be ſufficient to inveſt the eſtate in him in remainder, *yet upon the death of tenant for life, he in remainder ſhall be admitted, and pay a fine.*" And this is confirmed by Lord C. B. *Gilbert*, in his book on Tenures, 194.; and indeed it would be incongruous that where the firſt taker takes for life only, the next taker on his death ſhould not be admitted and pay his fine, when he would be bound to do ſo if the firſt taker had taken in fee. The caſes agree in this diſtinction; for in *Auncelm* v. *Auncelm* (*d*) the queſtion being only as to the title between two contending

(*a*) *Co. Copyh.* 149. (*b*) 1 Vol. 711.

(*c*) *Co. Copyh.* 157. *ſ.* 56. Ld. *Coke* concludes in the ſame manner as to an heir, (*ſ.* 41. *p.* 115.) "that an admittance is principally for the benefit of the lord *to entitle him to his fine*, and not much neceſſary for the ſtrengthening of the heir's title."

(*d*) *Cro. Jac.* 31.

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tenants, the admittance of tenant for life was holden to be the admittance of him in remainder. But in the *Earl of Bath* v. *Abney* (*a*), which was a caſe between lord and tenant, it was determined that the executor of a termor was bound to be admitted, and that the lord was entitled to a fine upon ſuch admittance. The queſtion there was, Whether a fine were due on every change of tenant, or only on every change of eſtate? and it was conſidered that on every change of tenancy the ſucceeding tenant was compellable to be admitted, though claiming under the ſame title as the antecedent one, becauſe a fine was due to the lord on every ſuch change, and to entitle him to it, it was neceſſary that the tenant ſhould be admitted. 2dly. At all events the cuſtom found is obligatory upon the defendant to come in and be admitted. Cuſtom is the ſoul and eſſence of a copyhold, and determines the law of it. There is nothing unreaſonable in the cuſtom, nor inconſiſtent with the nature of the eſtate granted. Till admittance the tenant was not entitled to the lord's protection; and it is a reaſonable conſideration for it that he has thereby a certain place for aſſuring his title. And if the lord be entitled to his fine in reſpect of the premiſes, it is reaſonable that he ſhould have the means of enforcing the payment of it by a ſeizure of the premiſes quouſque the tenant comes in and is admitted. In many inſtances the lord cannot tell who is the next in remainder till he comes in.

Beſt, contrà, after obſerving that this was more a queſtion between the tenant and the ſteward, than between the lord and tenant; for that the latter did not decline her fealty, but had offered it, and only objected to pay-

(*a*) 1 *Burr.* 206.

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ing a fine as for a new admiſſion, when ſhe conſidered that ſhe was already admitted tenant upon the rolls of the manor; contended, 1ſt, That by the general law of copyholds, the true rule of which was to be collected from *Brown*'s caſe (*a*), and from *Barnes* v. *Corke* (*b*), the admittance of tenant for life is the admittance of him in remainder, though by ſpecial cuſtom two fines may be due. That conſequently, if the tenant were already admitted, this ejectment cannot be maintained; but the lord has another remedy for his fine. The paſſage therefore cited from Ld. *Coke*'s Copyholder requiring the *admiſſion* of him in remainder ſtands alone, and has no authority cited in ſupport of it (*c*). And the caſe cited of *Auncelm* v. *Auncelm* (*d*) is expreſs that the admittance of the tenant for life is the admittance of him in remainder *without any other admittance*. But at any rate a new admittance can only be neceſſary, if at all, in caſes where the remainder is to a man's *right heirs*, or in the like caſes where he who is to take next was not before deſignated upon the lord's roll, and where conſequently the lord cannot tell who his tenant is from whom he is to have ſuit and ſervice, until he has come in and been admitted by name. Such was the caſe of the *Earl of Bath* v. *Abney* (*e*) where the ſurviving truſtee, who was named as tenant, being dead, the lord had no tenant on whom he could

(*a*) 4 *Rep.* 23. *a.* and vide *Gypſon* v. *Bunney*, *Cro. Eliz.* 504.

(*b*) 3 *Lev.* 308.

(*c*) Vid. *Co. Copyh. Supplement*, *p.* 28. *ſ* 7. cites *Dell* v. *Higden*, *Moor*, 358. which goes to ſhew, that without a cuſtom the lord is not entitled to a new fine from the remainder-man: though Lord *Coke* ſays it is otherwiſe of him in reverſion. And then according to the caſe of *Tipping* v. *Dunning*, *Moor*, 465. which was afterwards referred to by the Court, where the lord is to have a fine, there muſt be a new admittance.

(*d*) *Cro Jac.* 31. (*e*) 1 *Burr.* 206.

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call till the admittance of the executor of the laſt tenant, whoſe name was then for the firſt time put upon the roll. Then, 2dly, a cuſtom to admit one who is already admitted tenant is abſurd and unreaſonable, and repugnant to the nature of copyhold; in like manner as a cuſtom to ſurrender by attorney or out of court is void *as a cuſtom*, becauſe by the general law of copyhold it is incident to the tenure to do ſuch acts. Then the cuſtom ſtated is alſo void for uncertainty, in not defining any time within which the admiſſion is to be taken, and before which time the lord could not proceed to compel the tenant to come in. He alſo objected, 3dly, to the regularity of the proceedings; and contended, that this being a caſe of forfeiture was not to be encouraged, but that the proceedings ſhould be conſtrued ſtrictly. [*Per Curiam.* It is no *forfeiture* but only a *ſeizure quouſque*, to compel the tenant to come in and be admitted.] If the admittance of the tenant for life be by the general law the admittance of him in remainder, the ſeizure ſhould have been, not pro defectu tenentis, but for the non-payment of the fine. Then the next tenant being known and named in the rolls, the proclamations and the preſentment ſhould have been againſt her by name, the firſt requiring her perſonally to come in, the latter preſenting her perſonal default. And ſuch is the uſual practice where the next taker is known. He alſo referred to *Kitchen of Courts*, 244. 4th edit.

Alderſon in reply, ſaid, that the caſe of *Barnes* v. *Corke* (*a*) ſhewed at leaſt that a fine might be due by cuſtom on the admiſſion of a remainder-man; and here the jury have found ſuch a cuſtom. Then as to the irregu-

(*a*) 3 *Lev.* 308.

larity

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larity of the proceedings, the cuſtom need not fix any time for the next in remainder to come in, and then he muſt come in within a reaſonable time after the death of the tenant for life; and that is after the uſual proclamations. And no prejudice can ariſe to the tenant; for, as was ſaid by L.J. *Kenyon* in *Rex v. Tarrant* v. *Hellier* (*a*) the ſeizure is merely to compel the tenant to come in, and the lord can only retain the poſſeſſion quouſque. Then as to the generality of the proclamations and preſentment, it was ſufficient in a court baron as in other courts to make general proclamation for all perſons bound to attend to come in, there is no occaſion to proclaim each abſentee individually, whether known or not.

Lord ELLENBOROUGH C. J. adverted to the caſe of *Tipping* v. *Banning*, *Moor*, 465., which had not been mentioned, where it was adjudged, that if a copyhold be granted to one for life, remainder to another in fee, the admittance of the tenant for life is the admittance of him in remainder; the reaſon given for which is, that the lord is not to have a new fine upon the death of the tenant for life; *but where the lord is to have a fine, there muſt be a new admittance.*

Beſt obſerved, that the neceſſity of a new admittance was not ſtated ſo ſtrongly in the report of the ſame caſe, in *Cro. Eliz.* 504. by the name of *Gyppen* v. *Bunney*.

The caſe ſtood over for conſideration; and now

Lord ELLENBOROUGH C. J. delivered the judgment of the Court.

(*a*) 3 *Term Rep.* 162.

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DOE d. WHITBREAD *against* JENNEY.

In this case two questions have been made; the first and principal of which is, Whether the defendant, who claims a copyhold estate, the subject of this ejectment, under a surrender made on her marriage to the use of her late husband *Edmund Jenney* for life, remainder to herself for life, was, on the death of her husband, bound to come in and be admitted; there being a custom in the manor that where a tenant for life dies, the tenant in remainder shall come in to be admitted and pay a fine? The 2d question is, Whether the presentment that *E. Jenney* died seised, and the proclamations made, "that if any person would come into court and make just claim or title to the lands whereof *E. Jenney* died seised, such person should come into court and take admission to the same," be sufficient; inasmuch as the defendant, being designated by the surrender as the person to take in remainder on the death of *E. Jenney*, was not named in the presentment or proclamations? The defendant in this case does not object to paying the fine due by the custom from the person to whom the estate is limited in remainder; but contends that the admission of her husband was in law the admission of herself, and that any further admission is nugatory; and that a custom requiring one already admitted to be admitted again is unreasonable and void. To shew that the admission of the tenant for life is the admission of those in remainder, *Brown*'s case, 4 *Rep.* 22 *b.* was relied on, in which the doctrine is laid down, *that the admittance of the tenant for life is the admittance of him in remainder to vest the estate in him, but not to bar the lord of his fine*; and *Auncelm* v. *Auncelm*, *Cro. Jac.* 31. where a surrender having been made by a copyholder to *Martha* his wife for life, remainder to *Matthew* his son in fee; on which *Martha* was admitted; and *Matthew* the son without

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without other admittance having ſurrendered to the uſe of the plaintiff, the Court determined in his favour againſt the heir of *Matthew*; being of opinion, that the admittance of the feme was the admittance of him in remainder; as the particular eſtate and that in remainder made in law but one eſtate. And this laſt caſe was much relied on to ſhew, that the admiſſion of the tenant for life is fully and completely the admiſſion of him in remainder when deſignated on the roll, as in the preſent caſe the defendant is. On the other hand it was inſiſted, that where by cuſtom a fine is to be paid by the remainder-man, he is in ſuch caſe bound to be admitted, according to the doctaine of Lord *Coke* in his Treatiſe on Copyholders, 130, adopted by Lord C. B. *Gilbert*, in his Treatiſe on Tenures, p. 194: and that the caſe of *Auncelm* v. *Auncelm* only proves that the admittance of tenant for life is *the admittance of the tenant in remainder, ſo far as to veſt in him the eſtate in remainder*, and enable him to convey a title to it, but that it is not ſuch an admiſſion as to make him full and complete tenant to the lord. And further, that though it ſhould be holden that, where there is no cuſtom, the remainder-man need not be admitted; yet the preſent defendant was bound to be admitted, there being ſuch cuſtom within this manor, which is the life of copyholds: and that the cuſtom is a reaſonable one; as by means of it it will appear diſtinctly upon the rolls of the manor to whom the different copyholds belong, and the lord will be better able to call for his fines and enforce his ſuits and ſervices. In addition to the caſes mentioned by the plaintiff's counſel, that of *Gyppen* v. *Bunney*, as reported in *Moor*, 465. may be added; where it is laid down, that if a copyhold be ſurrendered to one for life, remainder to another in fee, *if the lord is to have a fine from the remain-*

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der-man there is occaſion for a new admittance. But without deciding, whether that be neceſſary without a cuſtom, we think ſuch cuſtom good for the reaſons ſuggeſted by the counſel for the plaintiff; and it is analogous to what is the law of coppholds, as it reſpects the heir, who upon the deſcent of the cuſtomary eſtate may ſurrender to the lord to the uſe of another before admittance, and who on the death of his anceſtor is immediately tenant by copy of court roll: the reaſon of which, as aſſigned by Lord *Coke* in *Brown*'s caſe, 4 *Co.* 22 *b.* is becauſe the copy made to his anceſtor belongs to him, as the admittance of tenant for life is the admittance of him in remainder: and yet according to Lord *Coke*, in his Copyholder, p. 94, the heir is not complete tenant before admittance to all intents and purpoſes; for till then peradventure he cannot be ſworn on the homage, nor maintain a plaint in the nature of an aſſize.

In ſupport of the ſecond objection no authority has been cited, but it has been reſted wholly in what was ſaid to be the uſual practice in courts baron of mentioning in the preſentment and proclamations the name of the perſon, when known, who ought to come in and be admitted. If the tenant, when known, were likely to be prejudiced by not being named, this objection would have weight. And though as the object of the preſentment is for the information and inſtruction of the lord, it would in reſpect of him be better to mention the perſon who ought to come and be admitted, when known; yet in reſpect to the heir or remainder-man, this is not the purpoſe of the preſentment, nor are the proclamations intended to inform perſons of their titles, but to give notice to thoſe who have a right to be admitted, that the tenancy is vacant, and that the lord requires of thoſe who are entitled to take

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upon them the tenancy: and it ſeems ſufficient, ſo far as the tenant is concerned, if the preſentment and proclamations be in the general terms uſed on this occaſion. For theſe reaſons we think there ſhould be judgment for the plaintiff.

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Doe d. Whitbread *againſt* Jenney.

Poſtea to the Plaintiff.

Wiggins *againſt* Stephens.

Tueſday, Nov. 27th.

Marryat obtained a rule to ſhew cauſe why the writ of procedendo iſſued in this cauſe to the Judges of the palace court ſhould not be ſet aſide for irregularity with coſts. The cauſe having been removed by habeas corpus into this court, ſpecial bail was put in, and a rule obtained in the vacation for better bail, which the defendant had till the firſt day of this term to comply with, when the bail attended to juſtify; but being rejected in a prior cauſe, they did not juſtify in this, but rendered the defendant; ſedente curiâ; which render was lodged with the proper officer of the palace court and allowed, and notice of it given to the plaintiff's attorney about 7 o'clock in the evening; before which time, viz. about 4 o'clock, after the riſing of the Court, the writ of procedendo had been ſued out.

Bail may render without juſtifying; and where the rule expires in vacation, a render on the firſt day of the enſuing term ſedente curiâ is good, though notice were not given till afterwards on the ſame day, and after a writ of procedendo had iſſued to an inferior court where the cauſe originated.

Lawes ſhewed cauſe, and contended that the render was not complete till notice, which ought therefore to have been given ſedente curiâ; the rule to render having expired in the vacation, and the bail having only by indulgence till the riſing of the Court on the firſt day of term to complete the render. But by

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WIGGINS *againſt* STEPHENS.

Lord ELLENBOROUGH C. J. The bail, though unable to juſtify, were ſufficient to render their principal (*a*); and having till the laſt moment of the ſitting of the Court to do ſo, the notice muſt neceſſarily be given afterwards; and having the whole day to give notice, if it be given any time in the day it is ſufficient.

Per Curiam, Rule abſolute (*b*).

(*a*) *Edwin* v. *Allen*, 5 *Term Rep.* 401. S. P.

(*b*) Vid. *Tidd's Pract.* 150 which mentions the ſame point ruled in H. 26 *Geo.* 3. and vid. ib. 190.

Wedneſday, Nov. 28th.

BINGHAM *againſt* SERLE.

When the ſtat. 43 *Geo.* 3. *c.* 55. *ſ.* 10. enabled a jury to aſſeſs a compenſation to the owner or perſons intereſted in land, which was taken poſſeſſion of by government; which compenſation was to be made "for the poſſeſſion or uſe thereof *during the time for which the ſame ſhould be required for the public ſervice*;" held that the aſſeſſment of a compenſation only *in groſs*, and without reference to time, as by an annual rent, was bad; becauſe of the uncertainty of the period for which the land would be required, of which no probable average eſtimate could be formed pending the exigency.

ASSUMPSIT for money had and received, and upon an account ſtated. Plea non aſſumpſit. At the trial before Lord *Ellenborough* C. J. at the ſittings at *Weſtminſter* after the laſt term a verdict was found for the plaintiff for 14,780*l.*, ſubject to the opinion of the Court on the following caſe:

The plaintiff is the incumbent of the chapelry of *Goſport*, and the perſon named in the warrant and inquiſition after mentioned. The defendant is receiver-general of the land-tax for the county of *Southampton*. On the 18th of *November* 1803 a warrant was ſigned, and iſſued by two of his majeſty's deputy lieutenants for the ſaid county, directed to the ſheriff thereof, ſtating that "whereas his majeſty had authoriſed the maſter general and principal officers of his majeſty's ordnance to ſurvey and mark out the piece of land ſituate at *Goſport*, in the pariſh of *Alverſtoke*, in the county of *Southampton*, holden by the Rev. *R. Bingham*, under leaſe from the Lord Biſhop of *Wincheſter*, and alſo the parcel of land granted by him for the purpoſe of erecting a dwelling-houſe, &c. for the reſidence of the

incumbent of *Gosport* chapel, together with such dwelling-house, &c. (and mentioning also certain other lands in the occupation of other persons, under lease from the Bishop of *Winchester*), the same being wanted for his majesty's service: and whereas they the undersigned, two of the deputy-lieutenants, &c. had pursuant to the statute in such case made issued their warrants under their hands and seals commanding possession of the said premises to be delivered to Col. *John Eveleigh*, the commanding royal engineer at *Portsmouth*, for the public service; they therefore required the sheriff to summon a jury to appear at *Gosport*, &c. on a certain day, to *inquire of and ascertain the compensation which ought to be made for the possession or use of the abovementioned premises* "*during the time for which the same should be required for the public service*," to the several persons interested therein, and to whom the same ought to be paid." In pursuance of this warrant an inquisition was taken before the sheriff on the 28th of *November*, at the place and by the jurors therein named; whereby the jurors found "that the Rev. *R. Bingham* was entitled to receive 14,780*l.* as a compensation for his damages by reason of giving up the premises therein mentioned to be required from him *for the exigency of government, during the time the same shall be so required*, to be paid *to him for his own use*; and to the further sum of 470*l.* as incumbent of the chapelry of *Gosport*, to be paid to the said *R. Bingham*, to the Lord Bishop of *Winchester*, and to the Rev. *J. Sturges*, LLD. *as trustees* for the benefit of the incumbent of the chapelry of *Gosport* for the time being: (and then it proceeds to find the compensation due to other lessees of the bishop for their damages sustained.) Which several sums the jurors found ought to be paid to the several persons aforesaid immediately

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upon demand thereof for the purpoſes aforeſaid." The caſe then ſtated, that a certificate of the inquiſition was ſigned by the ſaid two deputy lieutenants, and was on the 30th of *November* ſerved, together with the inquiſition and warrant annexed, upon the defendant, who was required by the plaintiff to pay the ſum of 14,780*l.* That the defendant at that time had money in his hands, as ſuch receiver-general, ſufficient to diſcharge the ſame, and promiſed to write to his deputy, and that there ſhould be no delay in the payment. [Upon the ſuggeſtion of the Court during the argument, that the act of parliament required certain preliminary ſteps to be taken, which did not appear on the face of the caſe to have been purſued, the caſe was afterwards agreed to be amended by inſerting the following facts.] That the officers of the Board of Ordnance were duly authoriſed by his majeſty to ſurvey and mark out the premiſes mentioned in the ſeveral warrants and certificate after mentioned, and to treat and agree with the perſons having any intereſt therein for the poſſeſſion or uſe thereof, *during ſuch time as the exigency of the ſervice ſhould require.* That in purſuance of ſuch authority the premiſes of the plaintiff in the ſaid warrant mentioned were duly ſurveyed and marked out, and a treaty was duly entered into with the plaintiff for the purpoſe aforeſaid. That the plaintiff refuſed to enter into ſuch contract touching the ſame as was ſatisfactory to the ſaid officers. That the ſaid officers of the Board of Ordnance did thereupon require two of the deputy lieutenants for the county of *Southampton* to iſſue their warrant according to the form of the ſtatute, &c. to put his majeſty's officers into immediate poſſeſſion of the ſaid premiſes. That in purſuance thereof, on the 14th of *November* 1803 a warrant was ſigned and iſſued by them, directed

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to and ſerved upon the plaintiff, and others holding or renting the parcels of ground therein mentioned, ſtating that "whereas his majeſty had authoriſed the maſter-general, &c. of the ordnance to ſurvey and mark out the parcel of land ſituate at *Goſport*, &c. holden by the Rev. *R. Bingham* under leaſe from the Lord Biſhop of *Wincheſter*, and alſo the parcel of land granted by him for the purpoſes of erecting a dwelling-houſe, &c. for the reſidence of the incumbent for the time being of *Goſport* chapel, together with a certain dwelling-houſe, &c. the ſame being wanted for the public ſervice: and that whereas the underſigned, two of the deputy-lieutenants, &c. purſuant to the ſtatute, certified that the poſſeſſion or uſe of the ſaid premiſes was neceſſary for the public ſervice *during ſuch time as the exigency of the ſervice ſhould require:* they therefore required and commanded the plaintiff, &c. to deliver the immediate poſſeſſion of the ſaid premiſes to Col. *John Eveleigh*, &c. or other his majeſty's officers appointed by him for that purpoſe, for the public ſervice." That a certificate was alſo ſigned by the ſaid deputy-lieutenants on the ſame day, ſtating that "Whereas his majeſty had authoriſed the maſter-general, &c. of the ordnance to ſurvey and mark out the lands in queſtion, (deſcribing them) holden by the Rev. *R. Bingham* under leaſe from the Lord Biſhop of *Wincheſter*, &c. the ſame being wanted for the public ſervice; they therefore certified, that the poſſeſſion or uſe of the ſaid premiſes *was neceſſary for the public ſervice, during ſuch time as the exigence of the ſtate ſhould require*, purſuant to the ſtat." &c. That under the ſaid warrant poſſeſſion was taken by the officers of government of all the premiſes therein mentioned, except of the dwelling-houſe, which by conſent of the Board of Ordnance the plaintiff was allowed to occupy as tenant

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at will to the ſaid board upon his undertaking to quit immediately upon notice for that purpoſe. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover? If he were, the verdict was to ſtand; if not, a verdict was to be entered for the defendant.

The caſe was argued on a former day of this term by *Scarlett* for the plaintiff, and *Gaſelee* for the defendant. The argument turned on the conſtruction of the ſtat. 43 *Geo.* 3. *c.* 55. *ſ.* 10. and reference was alſo had to *ſ.* 11. which was amended by ſtat. 43 *Geo.* 3. *c.* 96. And the principal grounds of contention on the part of the defendant were ſhortly theſe; that a *groſs* ſum (ſuch as had been given by the jury in this caſe) could not be a proper compenſation for a temporary poſſeſſion of uncertain duration, depending upon the *exigency of the public ſervice*, of which no probable computation could be made, there being no criterion by which it could be meaſured. 2dly, That the Biſhop of *Wincheſter*, who was intereſted in the compenſation to be given, was not a party to the proceeding before the jury. 3dly, That it was uncertain on the face of the inquiſition what intereſt the public took in the premiſes, in reſpect of which the compenſation was awarded. To which it was anſwered, in ſubſtance, that the duration of life and other uncertain periods, the value of good-will in houſes for trade, and other contingencies, were daily the ſubject-matter of computation, and verdicts were often founded thereon. That the queſtion of value was a matter of fact; and that after verdict the intereſt of the plaintiff muſt be taken to have been juſtly valued. 2dly, That it was no fault of the plaintiff if all the perſons intereſted were not brought before the jury,

jury, as he was merely paſſive in the proceeding, which was compulſive upon him on the part of government. That government might have agreed with the lord for his compenſation; or if not, that compenſation might ſtill be made to him if he ſhewed a grievance. But that the jury might have conſidered, that the injury from the temporary poſſeſſion compenſated was too remote to reach the lord. 3dly, That the act did not require the inquiſition to ſtate what intereſt the government took in the premiſes; and on the contrary, the whole proceeding was founded on an aſſumption of the uncertainty of the time for which it would be neceſſary to take the land. It was ſufficient that the inquiſition purſued the act of parliament, and was as certain as that.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an action for money had and received, brought under the ſtat. 43 *Geo.* 3. *c.* 55. by a leſſee of the Biſhop of *Wincheſter*, of a piece or parcel of land ſituate at or near *Goſport*, againſt the receiver-general of the land-tax for the county of *Southampton*, to recover the ſum of 14,780*l.*, which had been (as alleged by the plaintiff) duly aſſeſſed by a jury, as a compenſation to the plaintiff for his damages by reaſon of giving the poſſeſſion and uſe of that piece of land "*during the time for which the ſame ſhould be required for the public ſervice.*" The 10th clauſe of the act, upon which the claim is founded, and in conformity to which the aſſeſſment of compenſation is ſtated to have been and can alone really be made, enacts, "that it ſhall be lawful for his majeſty, &c. to authoriſe any officer, &c. to ſurvey and mark out any piece of ground wanted for the public ſervice, and to treat and agree with the

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the owner thereof, or any perſon having any intereſt therein, for the poſſeſſion or uſe thereof during ſuch time as the exigency of the ſervice ſhall require. And in caſe the owner, &c. ſhall decline to enter into ſuch contract touching the ſame as ſhall be ſatisfactory to ſuch officer, &c. or ſhall be unable, &c., it ſhall be lawful for the perſon ſo authoriſed by his majeſty, &c. to require two or more deputy-lieutenants, &c. to put his majeſty's officers into immediate poſſeſſion of ſuch piece of ground, &c., and ſhall for that purpoſe iſſue their warrant, &c., and ſhall alſo iſſue their warrant to the ſheriff, &c. to ſummon a jury, &c. to inquire of and aſcertain the compenſation which ought to be made for the poſſeſſion or uſe of ſuch piece of ground during the time for which the ſame ſhall be required for the public ſervice to the ſeveral perſons intereſted therein, and to whom the ſame ought to be paid: the verdict of which jury ſhall be certified by ſuch deputy-lieutenants, &c. to the receiver-general of the land-tax, &c. where ſuch lands ſhall lie; which receiver-general, &c. ſhall out of any money in his hands pay ſuch compenſation to ſuch perſon or perſons in ſuch manner and for ſuch purpoſes as by ſuch verdict ſhall be directed," &c.

Three objections have been taken to the plaintiff's right to recover the compenſation which has been thus aſſeſſed. 1ſt. That a groſs ſum (as this appears to be) cannot be a proper compenſation for a temporary poſſeſſion of uncertain duration. 2dly. That all the proper parties intereſted in the compenſation to be aſſeſſed were not before the jury. 3dly. That it is uncertain on the face of the inquiſition what intereſt the public take in the premiſes in reſpect of which the compenſation is awarded. The validity and effect of this inquiſition merely depends

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on its conformity to the powers and provisions of the act under which it was taken: it can neither be helped or impugned by any intendment to be drawn from any extrinsic matter. If the inquisition be not conformable to the powers and provisions of the act, it constitutes no obligation on the part of the receiver-general to pay the money assessed thereby, and of course lays no foundation for the implied promise, upon which this action should be supported.

As to the first of these objections, that a gross sum cannot be a proper compensation for a temporary possession of uncertain duration; it is not only true that a compensation proportioned to and measured by the time during which the occupation on the part of the public should continue is a better mode of compensation for a possession of uncertain continuance than the assessment of a gross sum, but the latter seems to be upon principle, and in all cases radically vicious. If I should assess a compensation upon a supposition that the exigency will terminate immediately, I may give far too little: if I calculate that it will last to a very distant period, I may give greatly beyond the mark; if I divide the difference, I place myself in the medium only between two extremes of similar injustice: but still I am not morally sure of doing justice or any thing near justice, only I have a chance of doing less injustice than if I adopted either extreme. Perhaps a gross sum, by way of immediate compensation for the mere immediate damage and inconvenience of removal or the like, and which occurs at once, and a payment afterwards, either annually or at certain fixed periods of time as long as the individual should be kept out of his property, would be the best mode of compensation. But a compensation only in gross, and without any reference to

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time, for an occupation which may either terminate immediately, or laſt for an indefinite length of time, which has not any circumſtances connected with it upon which an average eſtimate of its probable continuance, and a valuation calculated accordingly, may be formed; as the average duration of human life affords towards an eſtimate of the value of a life annuity or the like; but which reſts upon the mere duration of public exigency under all the various uncertainties to which not a calculation merely, but even a conjecture on ſuch a ſubject is liable; I ſay a compenſation ſo adjuſted cannot in its principle be otherwiſe than erroneous. If any proſpective eſtimate in the ſhape of a groſs ſum can be right, I admit that we muſt aſſume the ſum aſſeſſed by this verdict to be that ſum; but as long as the public exigency continues, and which may laſt indefinitely, it is always liable to be wrong; and till the exigency be paſſed can never be proved to be right. Can it be ſaid therefore that what is always liable to be wrong, and can never, (as at preſent whilſt the exigency continues it never can,) be proved to be right, is not fundamentally defective? The moſt that can be ſaid in favour of ſuch a mode of aſſeſſment is, that by accident it is barely poſſible that the ſum total of the ſeveral portions of compenſations, aſſeſſed according to time, might in the reſult happen to amount to the very ſame ſum as is now aſſeſſed in groſs. But the bare poſſibility of its happening to be right will not make the ground upon which it is decided leſs objectionable. If ſeveral numbers were written down by jurymen, and put into an hat, the jury may draw out that very ſum upon paper, and accordingly pronounce their verdict for that very ſum which upon a juſt conſideration of all circumſtances, if they had conſidered them, might have turned out to be

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the moſt proper amount of damages which they could have found. But would a verdict, ſo right by accident, be itſelf right, or could it be ſuſtained for a moment? A Judge either deciding at hazard or by a vicious rule, licet æquus ſtatuerit, haud æquus fuerit. The amount of damages aſſeſſed by a rule ſo vicious as that of compenſation in groſs is, and which can only be right in an event which is barely within the limits of human poſſibility to happen, muſt be wrong: and if ſo, it is leſs material to diſcuſs at large either of the two other remaining grounds of objection.

Upon the 2d of them however it may not be amiſs to add, that the 10th ſect. of the act in terms directs a jury to be ſummoned "to inquire of and aſcertain the compenſation which ought to be made for the poſſeſſion and uſe of the ground during the time for which the ſame ſhall be required for the public ſervice, to the ſeveral perſons intereſted therein, and to whom the ſame ought to be paid." And although in this inſtance the warrant of the two deputy-lieutenants for ſummoning the jury ſpecified as it ought to do the above-mentioned objects of their inquiry; and although it alſo expreſsly ſtated on the face of it that the piece of land in queſtion, for the uſe of which during the public exigency the compenſation was to be made, was holden by the Rev. *R. Bingham*, the plaintiff, under leaſe from the Lord Biſhop of *Wincheſter*; ſo that it appeared that there were in the very terms of the act "ſeveral perſons intereſted therein," namely, the leſſor, the Biſhop of *Wincheſter*, as well as the plaintiff, the leſſee; yet the jury have by this inquiſition found the compenſation for *R. Bingham*, the plaintiff, only, and have directed the ſame to be paid to him for his own uſe, without either compenſating

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the reverſionary intereſt of the Biſhop of *Wincheſter* therein, or declaring that from its inſignificance in value on account of the length of the exiſting term they had conſidered it as an intereſt not requiring any, or at leaſt any ſubſtantial compenſation. The length of the term is however no where ſtated; and it does not appear with certainty that recourſe can be had under this act a ſecond time to a jury to inquire of and aſcertain a compenſation for an intereſt which, though known to them to exiſt, was omitted to be compenſated under the firſt inquiſition; the poſſibility of which at leaſt ought clearly to appear in order to excuſe and obviate the conſequences of ſuch an omiſſion. I admit that if the reverſion of the biſhop was, as has been ſuppoſed in argument, a reverſion at the expiration of ſome extremely long term, that it would be very difficult to aſſign any juſt compenſation by a ſum in groſs for the remote and contingent uſe of the land during the period of ſuch reverſion. However, even upon this ſuppoſition, a compenſation in the form of annual rent, to be paid ſo long as the public exigency ſhould require the uſe of this land, would at any rate inſure to the reverſioner his proper quantum of ſatisfaction at the laſt, if the required uſe of the land ſhould continue beyond the duration of the exiſting term; which again evinces the fitneſs of a compenſation meaſured by time, and the unfitneſs of any other rule of compenſation as applied to ſuch a ſubject as the preſent. As the inquiſition therefore appears to us not to be maintainable, the conſideration for the implied promiſe of the defendant of courſe fails, and the plaintiff cannot on that account recover. The verdict therefore muſt in this caſe be entered for the defendant.

Poſtea to the defendant.

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Wedneſday, Nov. 28th.

The ſtat. 13 C. 2. *ſt.* 2. *c.* 2. *ſ.* 10. giving *double* coſts to the defendant in error if judgment be affirmed after verdict, is confined to caſes where the judgment ſo affirmed is for the *plaintiff below*, and not where the defendant below obtains judgment upon a ſpecial verdict.

IN an action on a policy of inſurance in *C. B.* a ſpecial verdict was found, on which there was judgment for the defendant; and on error brought in this Court that judgment was affirmed (*a*), and the ſingle coſts only of the writ of error were taxed by the Maſter for the defendant; on which a rule was obtained on a former day for the Maſter to review his taxation; the defendant contending that he was entitled to double coſts upon the ſtat. 13 *Car.* 2. ſt. 2. *c.* 2. *ſ.* 10. which enacts, "that if any perſon "ſhall proſecute any writ of error for reverſal of any "judgment whatſoever given after any verdict in any of "the courts aforeſaid, and the ſaid judgment ſhall after-"wards be affirmed, then every ſuch perſon ſhall pay "unto the defendant in the ſaid writ of error his *double* "coſts, to be aſſeſſed by the court where ſuch writ of "error ſhall be depending, for the delaying of execu-"tion."

Gibbs, *Park*, and *Puller*, ſhewed cauſe, and ſaid that it was plain from the preamble to that enactment, which was in the 8th ſection of the ſtatute that that proviſion was made ſolely with a view to prevent *plaintiffs* who had recovered verdicts below from being delayed in their damages by writs of error, and that it did not apply to caſes where the defendant below had obtained judgment after verdict, and the writ of error was brought by the plaintiff; becauſe he could not be ſaid in that caſe to delay execution for any debt. The 8th clauſe recites and approves the ſtatute 3 *Jac.* 1. *c.* 8. which enacts, "that no

(*a*) Ante, 398.

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execution ſhall be ſtaid or delayed by any writ of error, &c. for the reverſing of any judgment in any action of debt, &c. *or upon any contract*, &c. unleſs the perſon in whoſe name ſuch writ of error ſhall be brought, with two ſufficient ſureties, ſhall before ſuch ſtay made be bound to the party for whom ſuch judgment was given by recognizance *in double the ſum adjudged to be recovered by the ſaid former judgment* to proſecute the ſaid writ of error with effect, and *alſo to ſatisfy and pay*, if the ſaid judgment ſhall be affirmed, all the *debts*, *damages*, and coſts adjudged on the former judgment, and all coſts and damages to be alſo awarded for the ſame delaying of execution," &c. And then reciting "that divers other caſes *within the ſame miſchief* by delays of execution, &c. are not provided for," it makes proviſion for other caſes by *ſ.* 9.: and then by *ſ.* 10. gives the double coſts as a means of guarding againſt ſuch delays by writs of error. And they alſo obſerved that even the ſingle coſts of defendants in caſes like the preſent did not depend upon this ſtatute, but upon the ſubſequent ſtat. of the 8 & 9 *W.* 3. *c.* 11. *ſ.* 2.

The Court expreſſing a ſtrong opinion in favour of this interpretation of the ſtatute, which they ſaid was conſonant to the practice, *Erſkine*, who had obtained the rule niſi did not attempt to ſupport it. And

Lord ELLENBOROUGH C. J. added, that even if there could have been any doubt upon the meaning of the ſtat. of *Car.* 2. which was made to prevent delays of ſuit, and which therefore could not apply to writs of error brought by plaintiffs, who could not be ſaid to *delay* the defendants; yet the ſubſequent ſtatute of King *William*,

liam, which for the first time made provision even for *single* costs for defendants, against whom writs of error were prosecuted after having obtained judgment below, was a legislative interpretation of the former statute, which could not be answered.

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Rule discharged.

MAXWELL *against* SKERRETT.

Wednesday, Nov. 28th.

ON a rule for setting aside the proceedings for irregularity with costs, the facts were, that the declaration was delivered the 9th of *November*, indorsed to plead in four days, and with a demand of a plea in writing on the back of the declaration: but no rule to plead was given till the 12th of *November*; and on the 17th interlocutory judgment was signed as for want of a plea, without any other demand of one.

A demand of a plea indorsed on the declaration when delivered is good, and a rule to plead may be given afterwards without any fresh demand of a plea.

Marryat in support of the rule contended, that there could be no plea till after a rule to plead given, and that there should afterwards be a demand of a plea 24 hours before interlocutory judgment could be signed, for want of which in this case the judgment was irregular.

Reader contrà, said, that it had been decided in *The Churchwardens of Edmonton* v. *Osborne* (*a*) that a demand of a plea may be made at the time of delivering the declaration. And that it was sufficient that a rule to plead had in fact been given, though afterwards. And

(*a*) 6 *Term Rep.* 689.

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Per Curiam (after conſulting the Maſter.) The demand of a plea at the time of delivering the declaration has been determined to be good; and though it be uſual to give a rule to plead when the declaration is delivered, yet as a rule has been given, though given afterwards, whereby the defendant had more time to plead, there is no objection to it.

Rule diſcharged.

Tueſday, Nov. 20th.

PIERSON *againſt* ROBERT VICKERS, ANN his Wife, and Others.

Under a deviſe of all freehold and copyhold eſtates whatſoever ſituate at *B.* with their appurtenances, to *A.* and the heirs of her body lawfully to be begotten whether ſons or daughters, as tenants in common; and in default of ſuch iſſue then over; held, that *A.* took an eſtate tail.

GENTLE MORRIS, by his will duly executed, dated the 12th of *October* 1789, deviſed all his freehold and copyhold eſtates whatſoever, ſituate at *Belton* in the county of *Lincoln* (which copyhold eſtate he had ſurrendered to the uſe of his will) with all and every their appurtenances unto his daughter *Ann* (the defendant *Ann Vickers*), and to the heirs of her body lawfully to be begotten, whether ſons or daughters, as tenants in common and not as joint-tenants; and in default of ſuch iſſue he deviſed the ſaid hereditaments and premiſes to his ſiſters, (the defendants) *Mary Vickers* and *Jane Preſton*, for their joint lives, with remainders to truſtees to preſerve contingent remainders during the lives of his ſaid ſiſters. And from and after the deceaſe of either of the ſaid laſt-named ſiſters of the teſtator, he deviſed the ſaid hereditaments and premiſes unto all and every the child and children of his ſaid ſiſters, whether ſons or daughters, and their heirs and aſſigns for ever, as tenants in common, and not as joint-tenants. The teſtator died ſoon after; whereupon

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his daughter *Ann Vickers*, or her huſband in her right, entered into and is now in the poſſeſſion and receipt of the rents and profits of the teſtator's freehold and copyhold eſtates. The defendants *Mary Ann Vickers*, *Mary Vickers*, *Mary Haldenby*, *John Vickers*, *Joſhua Vickers*, *Elizabeth Vickers*, *Charles Vickers*, and *Gentle Vickers*, are the children of the ſaid *Ann Vickers*, the teſtator's daughter. *Robert Vickers* and *Ann* his wife having been adviſed that ſhe took an eſtate in tail general in the freehold and copyhold premiſes in *Belton* by virtue of the ſaid will, in *Hilary* term 41 *Geo.* 3. ſuffered a recovery of the freehold premiſes in that pariſh; and by leaſe and releaſe of the 6th and 7th of *February* 1801, the uſes of ſuch recovery were declared as to certain parts of the freehold eſtate (comprehending the premiſes in queſtion) to be to ſuch perſons, for ſuch eſtates, under ſuch powers, and in ſuch manner and form, as *Robert Vickers* ſhould by deed or will (to be executed and atteſted in the manner ſtated in the releaſe) appoint; and in default of ſuch appointment, to the uſe of the ſaid *Robert Vickers* in fee. *Robert Vickers* having been alſo adviſed that by the means aforeſaid he had acquired an eſtate in fee ſimple, or a power of conveying a fee in the ſaid freehold premiſes in queſtion, he ſome time after ſuffering ſuch recovery, contracted in writing to ſell the ſame to the plaintiff *H. Pierſon*; who objecting to his title, and contending that *Ann Vickers* took only an eſtate for life in the ſaid freehold premiſes, by virtue of the ſaid will, exhibited his bill in the Court of Chancery againſt *Robert Vickers* and *Ann* his wife, and the ſeveral other parties, defendants, for a ſpecific performance, if it ſhould appear that a good title could be made to the premiſes ſo contracted for, or if

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not, to have the contract cancelled; and after a hearing before the Maſter of the Rolls, his Honor directed this caſe to be ſtated for the opinion of this Court, upon the queſtion, What eſtate *Ann Vickers* took or acquired under and by virtue of the ſaid will in the ſaid freehold premiſes in queſtion?

Holroyd for the plaintiff contended, that *Ann Vickers* took an eſtate tail. The eſtate is not deviſed to her *for life*, and after her deceaſe to the heirs of her body, *whether ſons or daughters, as tenants in common*; but it is given to *her and the heirs of her body, &c.*; this indicates that the teſtator did not mean to confine the deviſe to his daughter *Ann* to an eſtate for life, eſpecially when it appears that where he meant only to give a *life* eſtate he has ſo expreſſed himſelf, as in the ſubſequent deviſe to his two ſiſters: and there he has interpoſed truſtees to preſerve contingent remainders between the deviſe to his two ſiſters, and that to their *children*, who he meant ſhould take as purchaſers. By "*ſons or daughters*" then was meant no more than "male or female." It is true he intended that the heirs of the body of *Ann* ſhould take as *tenants in common*, which they could only do by taking as purchaſers; but that would be inconſiſtent with his principal intent, which was that the eſtate ſhould not go over to his two ſiſters and their deſcendants till failure of all the iſſue of his daughter *Ann*; for the remainder over is only "in default of ſuch iſſue," *i. e.* of his daughter. But if the children of *Ann* took as purchaſers they could only take for life, there being no words of limitation or other words annexed to the deviſe to them to carry a greater eſtate. And again there being no croſs

remainders (*a*) between them, the ſhare of each dying would go over in remainder, which would be contrary to the declared intent of the teſtator, that the eſtate ſhould not go over to his ſiſters till default of iſſue of his daughter. Then if the two intents of the teſtator cannot take effect, namely, that the heirs of the body of *Ann* ſhould take as tenants in common, and alſo that the eſtate ſhould not go over in remainder till total failure of her iſſue, the latter, being the general and principal intent, muſt prevail over the former and minor intent; and that can only be by giving *Ann Vickers* an eſtate tail by reaſon of the deviſe to her and the heirs of her body, and the remainder over being in default of iſſue. As in *Doe* d. *Candler* v. *Smith* (*b*), where the deviſe was to *Mary Aſcough* and the heirs of her body to be begotten, forever, as tenants in common and not as joint-tenants; and in caſe ſhe ſhall happen to die before 21 or without leaving iſſue on her body, &c. then over: it was holden, that there being a general intent that the eſtate ſhould not go over till failure of all her iſſue, ſhe ſhould take an eſtate tail, although there was a particular intent that her iſſue ſhould take as tenants in common, which by that conſtruction would be defeated. The caſe of *Doe* v. *Cooper* (*c*) is ſtill ſtronger, becauſe in addition to the deviſe to the iſſue of the firſt taker as tenants in common, the limitation to the firſt taker was expreſsly *for life*. And ſo it was in *Robinſon* v. *Robinſon* (*d*). And theſe were recognized by Lord *Alvanley* in the late caſe of *Poole* v. *Poole* (*e*).

(*a*) The limitation over, *in default of iſſue* of his daughter, is of *the ſaid hereditaments and premiſes*: vide therefore *Watſon* v. *Foxon*, 2 *Eaſt*, 36.

(*b*) 7 *Term Rep.* 531.

(*c*) 1 *Eaſt*, 229.

(*d*) 1 *Burr.* 38.

(*e*) 3 *Boſ. & Pul.* 620.

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Wood, contrà, contended that the limitation to heirs of the body of *Ann Vickers*, which in itſelf would have given her an eſtate tail, was controlled by the ſubſequent words "*ſons and daughters*," which are words of purchaſe, deſcriptive of what the teſtator meant by *heirs of the body*, and by the limitation to ſuch ſons and daughters as *tenants in common*; for, as ſuch, they can only take by purchaſe and not by deſcent. Then *Ann Vickers* takes only for life, and her children take as purchaſers in fee, by reaſon of the word *eſtates*, which is ſufficient of itſelf to carry a fee to the ſons and daughters of *Ann Vickers*: and the intention of the teſtator that ſhe herſelf ſhould only take for life is ſhewn by making her children take as purchaſers. In all the other caſes the deviſe was of *lands*, *tenements*, or *hereditaments*, which of themſelves would not carry the fee; ſuch was *Doe* d. *Candler* v. *Smith* (*a*), and *Doe* v. *Cooper* (*b*); and in neither of them were the words *heirs of the body* or *iſſue* deſcribed as here to mean *ſons or daughters*. [Lord *Ellenborough*. How do you get rid of the words "*in default of ſuch iſſue?*"] *Such iſſue* has reference to *ſons or daughters*, and the teſtator meant that if *Ann Vickers* left no ſons or daughters living at her death, the eſtate ſhould then go over, which makes the ſubſequent deviſe an executory deviſe, being limited after a fee. [*Lawrence* J. What is there in the will to confine the words "in default of ſuch iſſue" to iſſue living at the time of *Ann Vickers*' death?] Becauſe a fee was before given to the children. [*Lawrence* J. Theſe words are always conſtrued to mean an indefinite failure of iſſue, unleſs reſtrained by other words.] It is clear that the teſtator meant to prefer the iſſue of his daughter to

(*a*) 7 *Term Rep.* 531. (*b*) 1 *Eaſt*, 229.

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the iſſue of his ſiſters; and having given the latter a fee, it cannot be ſuppoſed that he meant to give the former a leſs eſtate.

Holroyd in reply obſerved, that if the word *eſtates* as here uſed would carry a fee, it would veſt the fee in *Ann Vickers*, to whom it applied in the firſt inſtance. But it is clear that the teſtator did not intend that her children ſhould take the whole; for the eſtate is limited over in default of her iſſue. Then there are no words of limitation ſuperadded to the deviſe to her children; which diſtinguiſhes this from *Doe* v. *Laming* (*a*); ſo that unleſs *Ann Vickers* takes an eſtate tail, it does not appear that her iſſue can have a greater eſtate than for life; and there being no croſs remainders the ſhare of each dying would go over, which would be manifeſtly contrary to the general intent of the teſtator to prefer his daughter's iſſue to his ſiſters'.

Lord ELLENBOROUGH C. J. The two caſes cited of *Doe* d. *Candler* v. *Smith*, and *Doe* d. *Cock* v. *Cooper*, ſeem to apply very ſtrongly to the preſent. Though it is very doubtful in all theſe caſes whether we do not act contrary to the real intention of the teſtator in giving more than a life eſtate to the firſt taker. However we ſhall certify our opinion.

LAWRENCE J. In *Doe* d. *Candler* v. *Smith* Lord *Kenyon* felt very forcibly what was the particular intention of the teſtator, for he ſays there that "beyond all doubt the teſtator meant that the firſt taker ſhould take only an eſtate for life, becauſe he has ſaid ſo in expreſs terms:"

(*a*) 2 *Burr.* 1100.

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but as that appeared to him to be inconſiſtent with his general intent as expreſſed in the ſubſequent parts of the will, in order to give effect to ſuch general intent, he held it neceſſary to enlarge the firſt taker's eſtate to an eſtate tail. I doubt in this caſe how the word *eſtates* can be conſtrued to carry a fee, coupled as it is with words of local deſcription, and followed by a deviſe of the *appurtenances*, which would neceſſarily have been included if he had meant to give a fee by the word *eſtates*.

LE BLANC J. In almoſt every caſe of this ſort the rule of law has prevailed againſt the particular intent, in giving a larger eſtate than for life to the firſt taker.

The Court afterwards, on the 28th of *November*, unanimouſly certified in the uſual form to the Maſter of the Rolls, that they were of opinion that *Ann Vickers*, under and by virtue of the will of *Gentle Morris*, took an eſtate in tail general in the freehold premiſes in queſtion.

END OF MICHAELMAS TERM.

AN

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OF THE

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2. The toleration act, 1 *W. & M.* c. 18. provides (ſ. 18.) that any perſon malicioufly diſturbing any diſſenting congregation under that act, on proof before a juſtice of peace, ſhall find ſureties in 50*l.* or in default be committed to priſon till the next Seſſions, and on conviction forfeit 20*l.* to the Crown. To an action againſt magiſtrates for treſpaſs and falſe impriſonment they pleaded a charge preferred before them for an offence againſt that clauſe, and a commitment for want of ſureties under it to the next ſeſſions; and that before the next ſeſſions it was agreed between the proſecutor and the now plaintiff, *with the conſent* of the committing magiſtrates, (the now defendants,) that the proſecution ſhould be dropped, and the plaintiff be diſcharged at the ſeſſions for want of proſecution; that the plaintiff was accordingly then and there ſo diſcharged *in full ſatisfaction and diſcharge of the aſſault and impriſonment*: held that this was no legal ſatisfaction; for either the agreement was illegal, as ſtifling a proſecution for a *public miſdemeanor*, and thereby impeding the courſe of juſtice; or the ſatisfaction, if any, was moving from the proſecutor only, and not from the juſtices; their authority over the proſecution being at an end after the commitment of the plaintiff, and *their conſent*

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1. For the meaning of the word *Agreement*, as it occurs in the ſtatute of frauds, ſee *Frauds, Statute of.*
2. The toleration act, 1 *W. & M. c.* 18. provides (*ſ.* 18.) that any perſon maliciouſly diſturbing any diſſenting congregation under that act, on proof before a juſtice of peace, ſhall find ſureties in 5*l.*, or in default be committed to priſon till the next ſeſſions, and on conviction forfeit 20*l.* to the Crown. To

an action againſt magiſtrates for treſpaſs and falſe impriſonment, they pleaded a charge preferred before them for an offence againſt that clauſe, and a commitment for want of ſureties under it to the next ſeſſions; and that before the next ſeſſions it was agreed between the proſecutor and the now plaintiff, *with the conſent* of the committing magiſtrates, (the now defendants,) that the proſecution ſhould be dropped, and the plaintiff be diſcharged at the ſeſſions for want of proſecution; that the plaintiff was accordingly then and there ſo diſcharged *in full ſatisfaction and diſcharge of the aſſault and impriſonment:* held this was no legal ſatisfaction; for either the agreement was illegal, as ſtifling a proſecution for a *public miſdemeanor*, and thereby impeding the courſe of juſtice; or the ſatisfaction, if any, was moving from the proſecutor only, and not from the juſtices; their authority over the proſecution being at an end after the commitment of the plaintiff, and *their conſent* afterwards to the proſecutor dropping the proſecution being a mere nullity, and no ſatisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgcombe* v. *Rodd and Others*, *T.* 44 *G.* 3. 294

3. A carrier by water contracting to carry goods for hire *impliedly* promiſes that the veſſel ſhall be tight and fit for the purpoſe, and is anſwerable for damage ariſing from leakage. And this, though he had given notice "that he would not be anſwerable for *any* damage *unleſs* occaſioned by want of ordinary care in the maſter or crew of the veſſel, in which caſe he would pay 10*l.* per cent. upon ſuch damage, ſo as the whole did not exceed the value of the veſſel and freight." For a loſs happening by a perſonal default of the carrier himſelf (ſuch as the not providing a ſufficient veſſel) is not within the ſcope of ſuch notice; which was meant to exempt the carrier from loſſes by accident or chance, &c. even if it were competent to a common carrier to exempt himſelf by a ſpecial acceptance from the reſponſibility caſt upon him by the common law for a reaſonable reward to make good all loſſes not ariſing from the act of God, or the king's enemies. *Lyon* v. *Mells*, *T.* 44 *G.* 3. 428

4. *A.* agreed, in conſideration of 10*l.*, to let a houſe to *B.*, which *A.* was to repair and execute a leaſe of *within ten days*, but *B.* was to have immediate poſſeſſion, and in conſideration of the aforeſaid was to execute a counterpart, and pay the rent. *B.* took poſſeſſion, and paid the 10*l.* immediately; but *A.* neglected to execute the leaſe and make the repairs beyond the period of the ten days, notwithſtanding which *B.* ſtill continued in poſſeſſion: held that *B.* could not, by quitting the houſe for the default of *A.*, reſcind the contract and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the ſpecial contract: for a contract cannot be reſcinded by one party for the default of the other, unleſs both can be put in ſtatu quo as before the contract; and here *B.* had an intermediate poſſeſſion of the premiſes under the agreement. *Hunt* v. *Silk*, *M.* 45 *G.* 3. 449

5. Where one delivered goods of *above* 5*l.* value to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner, the carriers had declared they would not be accountable for any package *above* the value of 5*l.*, *unleſs* inſured and paid for accordingly: held, that the goods having been ſent by a different carriage and loſt, the owner

owner could not recover the value againſt the carriers; for the loſs happened by no tortious converſion, nor by a renunciation of their character as common carriers, but only by a negligent diſcharge of their duty as ſuch. Nor could he recover even the 5*l.*, as by the terms of the notice the carriers ſtipulated not to be anſwerable at all for goods *above* 5*l.* value, *unleſs* paid for accordingly. *Nicholſon* v. *Willan*, *M.* 45 *G.* 3. 507

APPRENTICE.

See STAMPS, No. 1.

1. The Court will not, at the prayer of the *maſter*, grant a habeas corpus to bring up an apprentice impreſſed, he being willing to enter into the king's ſervice. *Ex parte Landſdown*, *E.* 44 *G.* 3. 38
2. The captain of a ſhip of war detaining an apprentice who had been impreſſed, after notice by ſuch apprentice, is liable in an action by the maſter to recover wages for the ſervice of ſuch apprentice. *Eades* v. *Vandeput*, *M.* 25 *G.* 3. 39. n.

ASSETS.

See EXECUTOR, No. 1.

ASSUMPSIT,

See AWARD, No. 1. BILLS OF EXCHANGE, No. 1. TOLL, No. 1.

1. No perſon can upon the ſtatute of frauds be charged upon any promiſe to pay the debt of another, unleſs the *agreement* upon which the action is brought, or ſome note or memorandum thereof, be in writing; by which word *agreement* muſt be underſtood the *conſideration* for the promiſe as well as the promiſe itſelf. And therefore where one promiſed in writing to pay the debt of a third perſon, without ſtating on what conſideration, it was holden that parol evidence of the conſideration was inadmiſſible by the ſtatute of frauds; and conſequently ſuch promiſe appearing to be without conſideration upon the face of the written engagement, it was nudum pactum and gave no cauſe of action. *Wain* v. *Warlters*, *E.* 44 *G.* 3. 10
2. The plaintiff contracted to carry the defendant, his family, and luggage from *Demerary* to *Fluſhing*; and in the courſe of the voyage, within four days ſail of *Fluſhing*, the ſhip was captured by an *Engliſh* ſhip of war, and brought into *England*, and the ſhip and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings ſtill pending againſt the ſhip; but the defendant, and his family were liberated, and their luggage in fact reſtored to their poſſeſſion. Held that, however the queſtion might be as to the plaintiff's right to recover paſſage-money upon an implied aſſumpſit pro ratâ itineris if the ſhip were reſtored, yet pending the proceedings againſt the ſhip as prize in the Admiralty Court, no ſuch action could be maintained; for non conſtat, but that the ſhip might be condemned and the freight decreed to the captors. *Mulloy* v. *Backer*, *T.* 44 *G.* 3. 316
3. *A.* agreed in conſideration of 10*l.* to let a houſe to *B.*, which *A.* was to repair and execute a leaſe of *within ten days*, but *B.* was to have *immediate* poſſeſſion, and in conſideration of the aforeſaid was to execute a counterpart, and pay the rent. *B.* took poſſeſſion and paid the 10*l.* *immediately*, but *A.* neglected to execute the leaſe and make the repairs beyond the period of the ten days, notwithſtanding which *B.* ſtill continued in poſſeſſion: held that *B.* could not, by quitting the houſe for the default of *A.*, reſcind the contract and recover back the 10*l.* in an action for money had and received,

ceived, but could only declare for a breach of the ſpecial contract: for a contract cannot be reſcinded by one party for the default of the other, unleſs both can be put in ſtatu quo as before the contract: and here *B.* had an intermediate poſſeſſion of the premiſes under the agreement. *Hunt* v. *Silk*, *M.* 45 *G.* 3. 449

ATTACHMENT.

See AWARD, No. 2.

AWARD.

See AFFIDAVIT, No. 1.

1. Where a verdict is taken for a certain ſum, ſubject to the award of an arbritrator, to whom all matters in difference are referred by a rule of niſi prius, he cannot award a *greater* ſum than that for which the verdict was taken; and if he do, no aſſumpſit by implication will ariſe to pay even to the extent of the verdict ſo taken. *Bonner* v. *Charlton*, *E.* 44 *G.* 3. 139

2. Where parties by an indorſement in general terms on the bonds of ſubmiſſion to arbitration agree that the time for making the award ſhall be enlarged, ſuch agreement virtually includes all the terms of the original ſubmiſſion to which it has reference, amongſt others, that the ſubmiſſion for ſuch enlarged time ſhall be made *a rule of Court*: and conſequently the party is liable to an attachment for non-performance of an award made within ſuch enlarged time, under the ſtat. 9 & 10 *W.* 3. *c.* 15. *Evans* v. *Thomſon*, *E.* 44 *G.* 3. 189

3. *A.* declared in covenant againſt *B.* and her huſband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.* proteſting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded B.* to pay *A.* a certain ſum; and then alleged a breach for non-payment of ſuch ſum. After verdict, on non eſt factum pleaded; held that upon this declaration it muſt be taken that *B. intermarried after* the ſubmiſſion and *before* the *award* made; in which caſe, although the plaintiff could not recover upon the breach aſſigned *for non-payment of the ſum awarded*, becauſe the *marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itſelf *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arreſted on the ground that the marriage was a revocation of the arbitrator's authority, and that ſo the plaintiff could not recover *as for a breach by non-performance of the award*. *Charnley* v. *Winſtanley and his Wife*, *T.* 44 *G.* 3. 266

BANKRUPT.

1. Where the plaintiff gave the defendant in a foreign country, where both were reſident, a bill of exchange drawn by the defendant upon a perſon *in England*, which bill was afterwards proteſted here for non-acceptance, and the defendant afterwards, while ſtill reſident abroad, became bankrupt there, and obtained a certificate of diſcharge by the law of that ſtate: held that ſuch certificate was a bar to an action here upon an implied aſſumpſit to pay the amount of the bill in conſequence of ſuch non-acceptance in *England*. *Potter* v. *Brown*, *E.* 44 *G.* 3. 124

2. Where *A.* and *B.*, traders living in *London*, were in the courſe of ordering goods of the defendants, cotton manufacturers at *Manchester*, to be ſent to *M.* and Co. *at Hull*, for the purpoſe of being afterwards ſent to the correſpondents of *A.* and *B.* *at Hamburgh*; and on the 31ſt of *March A.* and *B.* ſent orders to the defendants for certain goods *to be ſent* to *M.* and Co. *at Hull, to be ſhipped for* Hamburgh *as uſual*: held that as between buyer and ſeller the right of the defendants to ſtop as *in tranſitu* was at an end when the goods came to the poſſeſſion of *M.* and Co. *at Hull*; for they were for this purpoſe the appointed agents of the vendees, and received orders from them as to the ulterior deſtination of the goods; and the goods, after their arrival at *Hull, were to receive a new direction from the vendees.* But it was competent for *A.* and *B.*, who became inſolvent ſome time in *July*, but committed no act of bankruptcy till the 26th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*. And held that the circumſtances of the bankrupts' having called a meeting of their creditors, and having taken legal advice, and being encouraged by the reſult of ſuch meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants; though done by the bankrupts in a ſituation of impending bankruptcy at the time; the defendants, at the time of ſuch giving up of the goods by the bankrupts, holding poſſeſſion of the goods upon a claim of right to ſtop them in tranſitu. *Dixon and Others, Aſſignees of Battier and Son, Bankrupts*, v. *Baldwen and Another*, E. 44 G. 3. 175

3. An order of the Lord Chancellor, made under the ſtat. 5 *G.* 2. *c.* 30., upon the petition of creditors, for removing one of ſeveral Aſſignees of a bankrupt's eſtate, not followed up by any re aſſignment or releaſe of ſuch aſſignee to the remaining aſſignees, nor by any new aſſignment of the commiſſioners under the Lord Chancellor's further order, does not operate to deveſt the legal eſtate out of ſuch removed aſſignee: and conſequently he ought to join in an action of trover brought by the aſſignees for a ſhip belonging to the bankrupt's eſtate. *Bloxam and Others, Aſſignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 G. 3. 407

4. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though the other aſſignees who ſue can only recover their proportional parts. *ib.*

5. A ſale of a ſhip (which was afterwards loſt at ſea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a ſufficient converſion to enable the aſſignees of the bankrupt to maintain trover, without ſhewing a demand and refuſal. *ib.*

6. The ſhip regiſter acts do not apply to a transfer of property by operation of law, ſuch as from the commiſſioners to the aſſignees of a bankrupt. *ib.*

BARON AND FEME.

See POOR-REMOVAL, No. 1.

BILLS OF EXCHANGE.

1. Where the plaintiff gave the defendant, in a foreign country, where both were reſident, a bill of exchange drawn by the defendant upon a perſon *in England*, which bill was afterwards proteſted here for non-acceptance, and the defendant afterwards, while ſtill reſident abroad,

broad, became bankrupt there, and obtained a certificate of discharge by the law of that ſtate; held that ſuch certificate was a bar to an action here upon an implied aſſumpſit to pay the amount of the bill in conſequence of ſuch non-acceptance in *England*. *Potter* v. *Brown*, *E.* 44 *G.* 3. 124

2. A bill of exchange payable to the *order* of *A.*, is payable to *A.* without alleging any order made; and it is ſufficient to declare that *A. delivered* the bill to the defendant, which he *accepted*, and by reaſon of the premiſes and according to the cuſtom of merchants became liable to pay the contents to *A.*, without alleging a *re-delivery* of the bill by the defendant: for if a re-delivery, or ſomething tantamount, to ſhew the aſſent of the drawee to charge himſelf, be neceſſary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c. *Smith* v. *M'Clure*, *M.* 45 *G.* 3. 476

3. A letter from the drawees of a bill in *England* to the drawer in *America*, ſtating that "their proſpect of ſecurity being ſo much improved they *ſhall accept* or *certainly pay* the bill," is *an acceptance* in law; although the drawees had before refuſed to accept the bill when preſented for acceptance by the holder, who reſided in *England*, and again after the writing ſuch letter refuſed payment of it when preſented for payment; and although ſuch letter written before were not received by the drawer in *America* till after the bill became due. *Wynne* v. *Raikes*, *M.* 45 *G.* 3. 514

CARRIER.

1. A carrier by water contracting to carry goods for hire *impliedly* promiſes that the veſſel ſhall be tight and fit for the purpoſe, and is anſwerable for damage ariſing from leakage. And this, though he had given notice "that he would not be anſwerable for *any* damage *unleſs* occaſioned by want of ordinary care in the maſter or crew of the veſſel, in which caſe he would pay 10 per cent. upon ſuch damage, ſo as the whole did not exceed the value of the veſſel and freight." For a loſs happening by the *perſonal* default of the carrier himſelf, (ſuch as the not providing a ſufficient veſſel,) is not within the ſcope of ſuch notice, which was meant to exempt the carrier from loſſes by accident or chance, &c.; even if it were competent to a common carrier to exempt himſelf by a ſpecial acceptance from the reſponſibility caſt upon him by the common law for a reaſonable reward to make good all loſſes not ariſing from the act of God, or the king's enemies. *Lyon* v. *Mells*, *T.* 44 *G.* 3. 428

2. Where one delivered goods of *above* 5*l.* *value* to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner the carriers had declared they would not be accountable for any package *above* the value of 5*l.*, *unleſs* inſured and paid for accordingly: held, that the goods having been ſent by a different carriage and loſt, the owner could not recover the value againſt the carriers: for the loſs happened by no tortious converſion, nor by a renunciation of their character as common carriers, but only by a negligent diſcharge of their duty as ſuch. Nor could he recover even the 5*l.* as by the terms of the notice the carriers ſtipulated not to be anſwerable at all for goods *above* 5*l.* *value*, *unleſs* paid for accordingly. *Nicholſon* v. *Willan*, *M.* 45 *G.* 3. 507

CHARGES.

Where a private act of parliament for building Stonehouſe Bridge directed

that certain perſons and their heirs ſhould ſtand ſeiſed of the tolls of the bridge "to the ſame uſes, truſts, and eſtates, and ſubject to the ſame wills, ſettlements, limitations, remainders, *charges*, tenures, rents, and incumbrances," as an ancient ferry was, in lieu of which the bridge was erected: held that the word *charges* only extended to *private* charges on the eſtate. *The caſe of Stonehouſe Bridge*, H. 44 G. 3. 356. *n.*

CHARTER.

See CORPORATION.

COMMITMENT.

See AGREEMENT, No. 2.

COMPENSATION.

Where the ſtat. 43 G. 3. *c.* 55. *ſ.* 10. enabled a jury to aſſeſs a compenſation to the owners or perſons intereſted in land, which was taken poſſeſſion of by Government; which compenſation was to be made "for the poſſeſſion or uſe thereof during the time for which the ſame ſhould be required for the public ſervice: held that the aſſeſſment of a compenſation only *in groſs*, and without reference to time, as by an annual rent, was bad; becauſe of the uncertainty of the period for which the land would be required, of which no probable average eſtimate could be formed pending the exigency. *Bingham* v. *Serle*, M. 45 G. 3. 534

CONSTABLES.

See JUSTICES OF PEACE, or TRESPASS, No. 1.

CONVICTION.

By the vagrant act 17 G. 2. *c.* 5. after "a rogue and vagabond has been committed to the Seſſions, and they, adjudging him to be *a rogue and vagabond*, order him to be further impriſoned and kept to hard labour for ſix months, and to be publicly *whipped* during that time, and that after the expiration of his impriſonment he ſhould be *ſent and employed in his Majeſty's ſervice purſuant to the ſtatutes*, &c.: held that the whole forms one ſentence; and ſuch order being defective in the latter part, for want of adjudicating whether the party were to ſerve his Majeſty by *ſea* or *land* as diſcriminated in the ſtatute, the conviction ſhould be quaſhed, though the former part of the ſentence, adjudging *the rogue and vagabond* to be *whipped*, be valid. *Rex* v. *Patchett*, T. 44 G. 3. 339

COPYHOLD.

See the NEXT HEAD.

1. Till the admittance of the ſurrenderee of a copyhold upon mortgage the ſurrenderor continues the legal tenant, and he cannot deviſe the equity of redemption even after the ſurrender made without a new ſurrender to the uſe of his will, but the legal eſtate, which on his death deſcends to his heir at law, will carry the equity of redemption alſo to the heir in reſpect to the mortgagee. *Doe* d. *Shewen, Widow*, v. *Wroot*, E. 44 G. 3. 132

2. Where a copyholder in fee, who had paid a fine on his original admittance, ſurrendered to the uſe of himſelf for life, remainder to his wife for life, remainder over; on which ſurrender and re-admittance no new fine was paid; and by the cuſtom a remainder-man coming into poſſeſſion on the death of tenant for life muſt be admitted and pay a fine: held, that ſuch a cuſtom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay his fine after proclamations made and preſentment by the jury, the

the lord may ſeize *quouſque* the tenant comes in, and maintain ejectment to recover the poſſeſſion in the mean time. And ſuch proclamations being in general terms for *any* perſon to come in and make title, &c. and the preſentment of default being alſo general, are good; though the perſon next in remainder were *known* and *named* in the ſurrender. *Doe d. Whitbread* v. *Jenney*, *M.* 45 *G.* 3. 522

3. See the next head.

COPYHOLD AND CUSTOMARY ESTATES.

See COPYHOLD.

1. Where there is a grant of a *particular* thing once ſufficiently aſcertained by ſome circumſtance belonging to it, the addition of an allegation, miſtaken or falſe, reſpecting it, will not fruſtrate the grant; but where a grant is in *general* terms, there the addition of a *particular* circumſtance will operate by way of reſtriction and modification of ſuch grant. Therefore where one having cuſtomary tenements, *compounded and uncompounded*, ſurrendered to the uſe of his will, "*all and ſingular the lands*, "*tenements*, *&c. whatſoever in the* "*manor which he held of the lord* "*by copy of court-roll*, in whoſe te"nure or occupation ſoever the "ſame were, *being of the yearly* "*rent to the lord in the whole of* "4l. 10s. 8½d., *and compounded* "*for*;" held that the words "*and compounded for*" reſtrained the operation of the ſurrender to that deſcription of copyholds then belonging to the ſurrenderor. And that the words "*being of the yearly rent*, *&c. of* 4l. 10s. 8½d.," which were not referable to any actual amount of the rents, either compounded or uncompounded, though much nearer to the whole than to the *compounded* only, could not qualify or impugn the reſtriction. *Roe d. Conolly* v. *Vernon*, *E.* 44 *G.* 3. 51

2. Where a teſtator had *freehold*, *cuſtomary*, and *copyhold* eſtates; and after introductory words, as to *all his worldly eſtate*, deviſed two rent-charges out of *all his real* eſtate, and alſo two *copyholds* in *Middleſex* for lives, and ſubject thereto deviſed "all his *freehold* manors, lands, &c. in *Yorkſhire* and other counties, and the reverſion of the two copyholds to his ſon for life, with ſucceſſive remainders in tail male to his firſt and other ſons, with like remainders to other branches in the male line;" and in default of ſuch iſſue he deviſed all his "*ſaid* (freehold) manors, land," &c. to his eldeſt daughter in tail male in ſtrict ſettlement, with like remainders to his ſecond and third daughters: and by the reſiduary clauſe deviſed *all other* his manors, lands, &c. either *freehold* or *copyhold*, (except thoſe in the counties of *York*, &c. which he had before diſpoſed of,) ſubject to the ſaid *rent-charges*, *in failure of iſſue male of his ſon* and himſelf, to his three daughters, as tenants in common in fee; held that certain *cuſtomary* eſtates, which the deviſor had, with *freehold* property in *Yorkſhire*, did not, on failure of the male line, paſs to the eldeſt daughter under the deſcription of all his *freehold* manors, lands, &c. in that and other counties. For, ſuppoſing that the *freehold* of ſuch *cuſtomary eſtates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the cuſtom of the manor*, and the tenants being entitled to the timber and mines, and the eſtates being demiſed and demiſeable in fee ſimple or otherwiſe; yet as they were holden by copy of court-roll, and paſſed by ſurrender and admit-

tance, and were generally reputed and called *copyholds*, and the teſtator having diſtinguiſhed in other parts of his will between *copyhold* and *freehold*, he muſt be preſumed to have uſed the word *freehold* in its uſual and popular ſignification, as not including theſe *cuſtomary eſtates* conſidered by himſelf as *copyholds*; and therefore ſuch cuſtomary eſtates paſſed to the three daughters under the reſiduary clauſe. And it ſeems that as by ſuch reſiduary clauſe the daughters would not take till failure of iſſue male of the ſon and of the deviſor; he, the ſon, the heir at law, took an eſtate-tail by implication in the cuſtomary eſtates not before deviſed. *Roe d. Conolly* v. *Vernon*, *E.* 44 *G.* 3. 51

CORPORATION.

See TOLL, No. 1.

1. A charter granted to the mayor, bailiffs, and burgeſſes, or the greater part of them, to chooſe *one of themſelves* to be mayor; but the ſame charter appointed the firſt mayor to continue for a year and until ſome *other burgeſs* ſhould be elected and ſworn, and the two firſt bailiffs to continue until *two other burgeſſes* ſhould be elected and ſworn; and it alſo directed the new mayor to be ſworn in before the *laſt* mayor, *his predeceſſor*, and the bailiffs for the time being, and the burgeſſes preſent; and in like manner the new bailiffs to be ſworn in before the mayor and the *laſt* bailiffs and the burgeſſes preſent. Theſe latter proviſions explain the firſt, and ſhew that the mayor muſt be choſen *out of the burgeſſes at large*, and not out of *the bailiffs*; and this avoids any queſtion as to the validity of a *ſwearing in* of an officer *before himſelf* by his name of office. *Rex* v. *Harper*, *E.* 44 *G.* 3. 208

2. Where a corporation, by a verbal agreement with a pauper, leaſed to him the tolls of a market for above 10*l.* a-year; held that he could not gain a ſettlement thereby, as no intereſt could paſs from a corporation but under their ſeal; therefore he had no more than a mere licence to collect the toll. But if ſuch toll had been leaſed to him under ſeal of the corporation, ſemble that he would have gained a ſettlement by reſiding for 40 days in the ſame pariſh where the market was. *Rex* v. *The Inhabitants of Chippingnorton*, *T.* 44 *G.* 3. 239

3. The voluntary abſence of a chief officer of a corporation upon the charter-day of election of his ſucceſſor is not indictable upon the ſtat. 11 *G.* 1. *c.* 4. *ſ.* 6., unleſs his preſence as ſuch chief officer be *neceſſary* by the conſtitution of the corporation to conſtitute a legal corporate aſſembly for ſuch purpoſe. *Rex* v. *Corry*, *T.* 44 *G.* 3. 372

4. Where a corporation were ſeiſed in fee of lands, which by the cuſtom were annually meted out under their controul by a leet jury, according to a certain ſtint, to ſuch of the reſident burgeſſes who choſe to ſtock the ſame; they paying 19*s.* 4*d.* to each of the other burgeſſes who did not ſtock: held that the burgeſſes who ſo ſtocked were tenants in common of the lands ſo occupied by them, and as ſuch occupiers were liable to be rated for the ſame. *Rex* v. *Watſon*, *M.* 45 *G.* 3. 480

COSTS.

1. Where the plaintiff recovered a verdict at the trial and had judgment in *C. B.*, and upon a bill of exceptions returned into this court judgment was reverſed, and the plaintiff took nothing by his writ, the defendant cannot have coſts. *Bell* v. *Potts*, *E.* 44 *G.* 3. 49

2. The

2. The *London* Court of Requeſts has juriſdiction by the ſtat. 39 & 40 G. 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar ſue in the ſuperior courts for the ſame, and recover leſs than 5*l.* upon a count in aſſumpſit for a quantum valebant, the defendant may enter a ſuggeſtion on the roll, ſtating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was ſerved with the writ, for the purpoſe of ouſting the plaintiff of his coſts, under the 12th ſect. of the act. *Sandby, Clk.* v. *Miller*, *E.* 44 *G.* 3. 194

3. Where in aſſumpſit the defendant pleaded the general iſſue, and the ſtatute of limitations to the whole ſum demanded, and as to part of it that the promiſes were made by the defendant's teſtator and one *A. B. jointly*, which *A. B.* ſurvived the other, and is ſtill living; and this laſt iſſue was found at the trial for the defendant, and the other two iſſues for the plaintiff, who thereupon had judgment for the reſt of his damages and coſts: held that the defendant was not entitled to have the coſts of the iſſue found for her deducted from the coſts of the trial which the plaintiff was entitled to on the iſſues found for him: aliter where all *the iſſues at the trial* are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry. *Poſtan* v. *Stanway, Executrix*, *T.* 44 *G.* 3. 261

4. An application to make the plaintiff, who reſided abroad, give ſecurity for the coſts, refuſed after notice of trial given; as the defendant might have applied earlier after knowledge of the fact of the plaintiff's reſidence, and before ſo much of the coſts were incurred. *Walters* v. *Frythall*, *T.* 44 *G.* 3. 338

5. Where a verdict was taken for 10*l.* in treſpaſs, ſubject to an award of damages, and the coſts *to abide the event*; if the arbitrator find leſs than 40*l.* damages, the plaintiff cannot have his coſts, though it be alſo found that the treſpaſs was *wilful*, and *that the defendant ſhould pay the plaintiff his coſts*: for coſts being directed to abide *the event*, means the *legal* event; and the authority of a judge to certify for coſts under the ſtat. 22 & 23 Car. 2. *c.* 9., where the treſpaſs is wilful is not transferred to the arbitrator under ſuch a rule of reference. *Ward* v. *Mallinder*, *M.* 45 *G.* 3. 480

6. The ſtat. 13 *C.* 2. ſt. 2. *c.* 2. *ſ.* 10. giving *double* coſts to the *defendant* in error, if judgment be affirmed after verdict, is confined to caſes where the judgment ſo affirmed is for *the plaintiff below* and not where *the defendant below* obtained judgment upon a ſpecial verdict. *Baring* v. *Chriſtie*, 45 *G.* 3. 545

COURT OF REQUESTS, LONDON.

See LONDON COURT OF REQUESTS.

COVENANT.

1. One who covenants for *himſelf, his heirs*, &c. and under his *own hand and ſeal*, for the act of another, ſhall be perſonally bound by his covenant, though he deſcribe himſelf in the deed as covenanting *for and on the part and behalf of ſuch other perſon*. *Appleton* v. *Binks*, *E.* 44 *G.* 3. 148

2. *A.* declared in covenant againſt *B.* and her huſband, for that *B.* before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were mode during their lives. And *A.*, pro-

proteſting that *B.* had not before her intermarriage performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded* B. to pay *A.* a certain ſum; and then alleged a breach for non-payment of ſuch ſum. After verdict, on non eſt factum pleaded; held that upon this declaration it muſt be taken that *B. intermarried after* the ſubmiſſion and *before* the *award* made; in which caſe, although the plaintiff could not recover upon the breach aſſigned, *for non-payment of the ſum awarded*, becauſe the *marriage* was a *countermand* of the *authority of the arbitrator*; yet as by the marriage itſelf *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arreſted on the ground that the marriage was a revocation of the arbitrator's authority, and that ſo the plaintiff could not recover *as for a breach by non performance of the award. Charnley* v. *Winſtanley and Wife.* T. 44 G. 3. 266

CUSTODY.

B. being in cuſtody at the ſuit of *A.*, in a joint action againſt *B.* and *C*, *B.* juſtifies bail in an action intitled by miſtake "*A.* againſt *B.*" only, and a rule ſo intitled is ſerved on the marſhal of *B. R.*, who thereupon diſcharges *B.* out of cuſtody, he not being charged in cuſtody in any more than one action at the ſuit of *A.*: held that the marſhal was liable in an action for an eſcape. *White* v. *Jones, Marſhal of K. B. &c.* T. 44 G. 3. 292

CUSTOMARY ESTATES.

See COPYHOLD AND CUSTOMARY ESTATES.

DAMAGES.

See COMPENSATION.

DEBAUCHING DAUGHTER.

See ACTION ON THE CASE, No. 1.

DEVISE.

See WILL.

1. Where a teſtator had *freehold*, *cuſtomary*, and *copyhold* eſtates; and after introductory words, as to *all his worldly eſtate*, deviſed two rent-charges out of *all his real* eſtate, and alſo *two copyholds* in *Middleſex* for lives; and ſubject thereto deviſed "all his *freehold* manors, lands, &c. in *Yorkſhire* and other counties, and the reverſion of the two copyholds to his ſon for life, with ſucceſſive remainders in tail male to his firſt and other ſons, with like remainders to other branches in the male line:" and in default of ſuch iſſue he deviſed all his "*ſaid* (freehold) manors, land," &c. to his eldeſt daughter in tail male in ſtrict ſettlement, with like remainders to his ſecond and third daughters: and by the reſiduary clauſe deviſed *all other* his manors, lands, &c. either *freehold* or *copyhold* (except thoſe in the county of *York*, &c. which he had before diſpoſed of), ſubject to the ſaid *rent-charges*, *in failure of iſſue male of his ſon* and himſelf, to his three daughters as tenants in common, in fee: held that certain *cuſtomary* eſtates, which the deviſor had, with freehold property in *Yorkſhire*, did not, on failure of the male line, paſs to the eldeſt daughter under the deſcription of all his *freehold* manors, lands, &c. in that and other counties. For ſuppoſing that the *freehold* of ſuch *cuſtomary eſtates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the cuſtom of the manor*, and

the tenants being entitled to the timber and mines, and the eſtates being demiſed and demiſeable in fee ſimple or otherwiſe; yet as they were holden by copy of court-roll, and paſſed by ſurrender and admittance, and were generally reputed and called *copyholds*, and the teſtator having diſtinguiſhed in other parts of his will between *copyhold* and *freehold*, he muſt be preſumed to have uſed the word *freehold* in its uſual and popular ſignification, as not including theſe *cuſtomary* eſtates, conſidered by himſelf as *copyholds*; and therefore ſuch cuſtomary eſtates paſſed to the three daughters under the reſiduary clauſe. And it ſeems that as by ſuch reſiduary clauſe the daughters would not take till failure of iſſue male of the ſon and of the deviſor; he, the ſon, the heir at law, took an eſtate tail by implication in the cuſtomary eſtates not before deviſed. *Roe d. Coudly* v. *Vernon*, E. 44 G. 3. 51

2. One deviſed thus: "Concerning "my wordly eſtate, I give and be- "queath to *M. M.* 1*l.* *Alſo I give* "*and bequeath* to *A. M.* 2*l.*" (with pecuniary bequeſts to ſeveral others in the ſame form of words); "*Alſo* "*I give and bequeath* to *G. S.* my "meſſuage and lands, &c. in *W.* "*Alſo I give and bequeath* to the "ſaid *G. S.* and his wife all my "lands, &c. in *B.* *Alſo* all my meſ- "ſuages, &c. in *W.* *Alſo* all my "goods, chattels, &c. and perſonal "eſtate, *after having thereout firſt* "*paid and diſcharged* all my *debts* "*and funeral expences*: *Alſo ſubject* "*to the payment thereout all the afore-* "*ſaid legacies*. And I nominate the "ſaid *G. S.* to be *ſole executor*, "*whom I charge* with the payment "of my debts, legacies, and funeral "expences," &c. Held that *G. S.* and his wife took a fee in the real eſtate deviſed to them, by reaſon of the words "*having thereout firſt* "*paid all my debts*," &c. which was a *perſonal* charge on them in reſpect of the realty as well as perſonalty, all deviſed in one entire ſentence, together with ſuch charge. *Doe d. Stevens and Pain* v. *Snilling*, E. 44 G. 3. 87

3. Under a deviſe of *lands, arrears of rent*, and *a bond and judgment*, to trustees and the *ſurvivor*, and the *executors*, &c. of ſuch ſurvivor, in truſt, *out of the rents and profits* of the ſaid eſtates and arrears, &c. to pay certain *annuities* for *lives*, and *a ſum in groſs*; and from and after payment of the ſaid annuities and money, the teſtator deviſed ſeveral five eſtates for lives, remainder to *C. W.* in tail, remainder to his own right heirs; and he alſo gave a general power of *leaſing* to the truſtees for the beſt rent, with an allowance of 10*l.* a year to each for their trouble: held that *the purpoſes of the truſt being all anſwered* by the death of the annuitants, and the raiſing of the money for legacies, the remainder-man in tail, (the life eſtate being ſpent,) took the *legal* eſtate in the premiſes. For where the purpoſes of a truſt may be anſwered by giving the truſtees a leſs eſtate than a fee, no greater eſtate ſhall paſs to them *by implication*; but the uſes in remainder limited on ſuch leſſer eſtate ſo given to them ſhall be executed by the ſtatute. And in this caſe it is ſufficient to anſwer the purpoſes of the truſt to give the truſtees by implication an eſtate *for the lives of the annuitants*; with *a term of years in remainder* ſufficient for the purpoſe of raiſing the *groſs ſum* charged *out of the rents and profits*. And this conſtruction is further confirmed in this particular caſe by the bequeſt to the truſtees of the *arrears* and *the bond and judgment*, as well as of the rents and profits; for other-

otherwiſe the intereſt in the bond, &c. would go to different repreſentatives than the eſtate, if the truſtees took a *fee*; and the *leaſing power* was only to be executed as the occaſions of the truſt required. And there was alſo a *perſonal remuneration* to the truſtees of 10*l.* a year for their trouble, which was not extended to their *heirs*. *Doe d. White* v. *Simpſon*, *E.* 44 *G.* 3. 162

4. Under a deviſe "to *A.* for life, "and after him to his eldeſt or any "other ſon after him for life, and "after them to as many of his de"ſcendants iſſue male as ſhall be "heirs of his or their bodies down "to the tenth generation, during "their natural lives:" held that *A.* took no more than a life eſtate; for here is no *general* intent to create an eſtate tail, as contradiſtinguiſhed from the *particular* intent to give an eſtate for life to the firſt taker; but a ſingle intent to create a ſucceſſion of life eſtates to perſons not in eſſe, which the law will not allow. *Seaward* v. *Willock*, *E.* 44 *G.* 3. 198

5. The word *ſhare* may carry a leaſehold eſtate. As where a teſtator, having three ſons and one daughter, and leaſehold eſtates and perſonal funds, deviſed one leaſehold eſtate to his eldeſt ſon, and other leaſeholds to his ſecond ſon, directing his executors to receive and apply the rents until they came of age; and then directed a certain ſum to be put out at intereſt for the benefit of his widow, durante viduitate, and that on her death or marriage it ſhould be divided equally between his three ſons, *ſhare and ſhare alike*; and then he gave his daughter 600*l.* to be paid her when of age; and then gave the reſidue of his worldly effects to be divided equally amongſt his three ſons, *ſhare and ſhare alike*; and laſtly directed that "if any of his ſaid children died under age and without lawful iſſue, the *ſhare* of *him* or *her* deceaſed ſhould go equally amongſt his ſurviving ſons:" held, that the word *ſhare* in the laſt clauſe referring as it muſt do to the *whole* ſhare or portion of the *daughter*, muſt have the ſame meaning as to the ſons, and muſt compriſe the leaſehold as well as perſonal funds before given to them; and that upon the death of the eldeſt ſon under 21, and without iſſue, the leaſehold eſtate deviſed to him went equally between the two ſurviving ſons. *Doe d. Stopford* v. *Stopford*, *M.* 45 *G.* 3. 501.

6. Under a deviſe of all freehold and copyhold eſtates whatſoever ſituate at *B.* with their appurtenances, to *A.* and the *heirs of her body* lawfully to be begotten whether *ſons or daughters*, as *tenants in common*; and in default of ſuch iſſue, then over: held that *A.* took an eſtate tail. *Pierſon* v. *Vickers*, *M.* 45 *G.* 3. 548

DISCHARGE OF DEBTOR.

See ESCAPE.

EAST INDIA COMPANY.

See INDICTMENT againſt Officers in *India* for receiving Preſents contrary to the ſtat. 33 *G.* 3. *c.* 52. *ſ.* 62.

EJECTMENT.

See COPYHOLD, No. 2. JOINT TENANTS, No. 1. NOTICE TO QUIT.

In Ejectment the legal title muſt prevail, vid. *Weakley* d. *Yea Bart.* v. *Rogers*, in the Exchequer Chamber, *M.* 30 *G.* 3. and other caſes refered to in the note to *Doe* d. *Shewen* v. *Wroot*. 138-9

EQUITY OF REDEMPTION.

See COPYHOLD, No. 1.

ERROR, WRIT OF.

See PRACTICE, No. 2.

ESCAPE.

1. *B.* being in cuſtody at the ſuit of *A.* in a joint action againſt *B.* and *C.* *B.* juſtifies bail in an action entitled by miſtake "*A.* againſt *B.*" only, and a rule ſo entitled is ſerved on the marſhal of *B. R.* who thereupon diſcharges *B.* out of cuſtody, he not being charged in cuſtody in any more than one action at the ſuit of *A.*: held that the marſhal was liable in an action for an eſcape. *White* v. *Jones, Marſhall of K. B.* &c., *T.* 44 *G.* 3. 292

2. In an action againſt the marſhal for an eſcape, it being alleged in the declaration that the priſoner was arreſted on meſne proceſs, and brought before a judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the cuſtody of the marſhal, *as by the record thereof now remaining in the Court of B. R.* appears, &c. ſuch allegation is neither impertinent and ſurpluſage; for properly ſpeaking, ſuch document are not *records* nor capable of becoming ſo: or, conſidering them as *quaſi of record*, the allegation is ſufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* priſon, with whom they were properly depoſited. *Wigley* v. *Jones, Marſhal of the Marſhalſea*, *T.* 44 *G.* 3. 440

EVIDENCE.

1. No perſon can by the ſtatute of frauds be charged upon any promiſe to pay the debt of another, unleſs the *agreement* upon which the action is brought, or ſome note or memorandum thereof, be in writing; by which word *agreement* muſt be underſtood the *conſideration* for the promiſe as well as the *promiſe* itſelf. And therefore where one promiſed in writing to pay the debt of a third perſon, without ſtating on what conſideration; it was holden that *parol* evidence of the conſideration was inadmiſſible by the ſtatute of frauds; and conſequently ſuch promiſe appearing to be without conſideration upon the face of the written engagement, it was nudum pactum and gave no cauſe of action. *Wain* v. *Warlters*, *E.* 44 *G.* 3. 10

2. An averment that the plaintiff was ready and willing to transfer and requeſted the defendant to accept ſtock, can only be ſatisfied by ſhewing an actual tender and refuſal, or that the plaintiff waited at the bank on the day when it was underſtood that the transfer was to be made until the cloſe of the transfer-books, which was the lateſt time when the transfer could be made. *Bordenave* v. *Gregory*, *E.* 44 *G.* 3. 107

3. An averment that ſtock was to be transferred *on requeſt* is not proved by evidence that it was to be transferred on *a certain day*. *Bordenave* v. *Bartlett*, *E.* 44 *G.* 3. 111

4. The Seſſions having decided in favour of a ſettlement in *A.*, by which the pauper's father was proved to have been *relieved while reſident in another pariſh* 40 years ago, and before the pauper's birth; and the only evidence to oppoſe this being that of the pauper's own birth in *B.*; this Court confirmed the order of Seſſion on a caſe reſerved. *Rex* v. *The Inhabitants of Wakefield*, *T.* 44 *G.* 3. 335

EXECUTION.

If one of two defendants taken on a joint ca. ſa. be diſcharged under an inſolvent debtors act, that will not operate as a diſcharge of the other, the diſcharge

charge of the former not being with the actual conſent of the plaintiff. *Nadin* v. *Battie and Wardle*, E. 44 G. 3. 147

EXECUTOR.

A count upon an account ſtated with the plaintiff, *executrix*, &c. (not ſaying *as* executrix, &c.) cannot be joined with counts on promiſes to the teſtator; for it is no allegation that the promiſes were made to the plaintiff in her repreſentative capacity; and under ſuch a count proof might be given of an account ſtated with her in her individual character. *Qu.* Whether if it had been laid to be on an account ſtated with the plaintiff herſelf, though named *as executrix*, &c. it could be ſo joined, as the cauſe of action would ſtill appear to have ariſen in the time of the executrix, though the money, when recovered, would be aſſets? *Henſhall* v. *Roberts, in error*, E. 44 G. 3. 150

EXEMPTION.

Where an act directs that the *tolls* of a navigation ſhould be exempt from any taxes, rates, &c. other than ſuch as the *land* which ſhould be uſed for the purpoſe of the navigation would have been ſubject to if the act had not been made; that goes to exempt the *tolls* quà *tolls* altogether from being rated in reſpect of the line ſo exempted, leaving the *land* rateable as before. *Rex* v. *The Leeds and Liverpool Canal Company*. T. 44. G. 3. 325

FALSE IMPRISONMENT.

1. The toleration act, 1 *W.* & *M.* *c.* 18. provides (*ſ.* 18.) that any perſon maliciouſly diſturbing any diſſenting congregation under that act, on proof before a juſtice of peace, ſhall find ſureties in 5*o*l., or in default be committed to priſon till the next ſeſſions, and on conviction forfeit 20*l.* to the Crown. To an action againſt magiſtrates for treſpaſs and falſe impriſonment, they pleaded a charge preferred before them for an offence againſt that clauſe, and a commitment for want of ſureties under it to the next ſeſſions; and that before the next ſeſſions it was agreed between the proſecutor and the now plaintiff, *with the conſent* of the committing magiſtrates (the now defendants), that the proſecution ſhould be dropped, and the plaintiff be diſcharged at the ſeſſions for want of proſecution; that the plaintiff was accordingly then and there ſo diſcharged *in full ſatisfaction and diſcharge of the aſſault and impriſonment*: held this was no legal ſatisfaction; for either the agreement was illegal, as ſtifling a proſecution for a *public miſdemeanor*, and thereby impeding the courſe of juſtice; or the ſatisfaction, if any, was moving from the proſecutor only, and not from the juſtices; their authority over the proſecution being at an end after the commitment of the plaintiff; and *their conſent* afterwards to the proſecutor dropping the proſecution being a mere nullity, and no ſatisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgcombe* v. *Rodd and Others*, T. 44 G. 3. 294

2. An indictment for an aſſault, falſe impriſonment, and reſcue, ſtated that the Judges of *the Court of record of the town and county*, &c. of *P.*, iſſued their writ, directed to *T. B., one of the Serjeants at Mace of the ſaid town and county*, to arreſt *W.*, by virtue of which *T. B.* was proceeding to arreſt *W. within the juriſdiction of the ſaid Court*, but that the defendant aſſaulted *T. B. in the due execution of his office*, and prevented

vented the arreſt: held ſuch indictment bad; it not appearing that *T. B.* was *an officer of the Court*: and that there could not be judgment after a *general* verdict on ſuch a count as for a common aſſault and falſe impriſonment, becauſe the jury muſt be taken to have found that the aſſault and impriſonment was for the cauſe therein ſtated, which cauſe appears to have been that the officer was attempting to make an illegal arreſt of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Oſmer*, T. 44 G. 3. 304

FOREIGN SENTENCES.

1. Where a foreign Court of Prize profeſſes to condemn a ſhip and cargo on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured; ſuch ſentence is concluſive in our courts againſt *a warranty of neutrality* of ſuch ſhip and cargo in an action upon a policy of inſurance againſt the underwriter; although inferences were drawn in ſuch ſentence from ex parte ordinances in aid of the concluſion of ſuch infraction of treaty. *Baring* v. *The Royal Exchange Aſſurance Company*, E. 44 G. 3. 99

2. A ſentence of a foreign Court of Prize is concluſive evidence in an an action upon a policy of inſurance upon every matter within the juriſdiction of ſuch Court upon which it has profeſſed to decide. Therefore where a *Daniſh* ſhip, *warranted neutral*, was captured by a *French* ſhip of war, (*Denmark* being at peace with *France*,) and the court in which ſhe was libelled as prize, profeſſing to conſider that the *built* of the veſſel was *unknown*, that ſhe was *ſold* to a *neutral* ſubject *only ſince* the declaration of war, that the bill of ſale did not mention her *place of built*, or her *original owner*, that the mate and third officer were naturalized *Danes only ſince* the declaration of war, and that the greater part of the *crew* were ſubjects of *hoſtile* powers, condemned the ſhip as *good and lawful prize*; ſuch condemnation is concluſive againſt the warranty of neutrality in an action on the policy againſt the underwriter, and no evidence can be received to falſify the facts affirmed by ſuch ſentence, nor to ſhew that the concluſion was unfounded: although the ſentence proceeded to refer to certain ordinances of *France*, containing rules to direct the judgment of its Courts in the conſideration of the queſtion of neutrality; by which rules the Prize Court appears to have regulated their judgment in the concluſion they had drawn. *Bolton* v. *Gladſtone*, E. 44 G. 3. 155

FORFEITURE.

See AGREEMENT, No. 2.

FRAUDS, STATUTE OF.

1. No perſon can, by the ſtatute of frauds, be charged upon any promiſe to pay the debt of another, unleſs the agreement upon which the action is brought, or ſome note or memorandum thereof, be in writing; by which word *agreement* muſt be underſtood the *conſideration* for the promiſe, as well as the *promiſe* itſelf. And therefore where one promiſed in writing to pay the debt of a third perſon, without ſtating on what conſideration; it was holden that *parol* evidence of the conſideration was inadmiſſible by the ſtatute of frauds; and conſequently ſuch promiſe appearing to be without conſideration upon the face of the written engagement, it was nudum pactum, and

and gave no cauſe of action. *Wain* v. *Warlters*, E. 44 G. 3. 10

2. The ſtatute is ſuppoſed to have been drawn by Lord *Hale*. *ib.* 17

FREEHOLDER.

See PASSING, No. 2.

FREIGHT.

See INSURANCE, No. 3. PASSAGE-MONEY.

GRANT.

1. Where there is a grant of a particular thing once ſufficiently aſcertained by ſome circumſtance belonging to it, the addition of an allegation, miſtaken or falſe, reſpecting it, will not fruſtrate the grant: but where a grant is in *general* terms, there the addition of a *particular* circumſtance will operate by way of reſtriction and modification of ſuch grant. *Roe d. Conolly* v. *Vernon*, E. 44 G. 3. 51

2. Therefore where one having cuſtomary tenements, *compounded and uncompounded*, ſurrendered to the uſe of his will "*all and ſingular the lands*, "*tenements*, &c. *whatſoever*, *in the* "*manor*, *which he held of the lord by* "*copy of court-roll*, in whoſe tenure or "occupation ſoever the ſame were, "*being of the yearly rent to the lord* "*in the whole of* 4l. 10s. 8½d., *and* "*compounded for*:" held that the words "*and compounded for*," reſtrained the operation of the ſurrender to that deſcription of copyholds then belonging to the ſurrenderor. And that the words "*being of the* "*yearly rent*, &c. *of* 4l. 10s. 8½d.," which were not referable to any actual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that reſtriction. *ib.*

HABEAS CORPUS.

See APPRENTICE, No. 1. RECORD.

1. The father of a child is entitled to the cuſtody of it, though an infant at the breaſt of its mother, if the Court ſee no ground to impute any motive to the father injurious to the health or liberty of ſuch a child, as by ſending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an *Engliſh-woman*, and apprehenſive only that he meant to ſend the child abroad, but aſſigning no ſufficient reaſon for ſuch her apprehenſion. *Rex* v. *de Manneville*, E. 44 G. 3. 221

2. If the putative father of a baſtard child obtain poſſeſſion of it by force or fraud, the Court will order it to be reſtored on the application of the mother. *Rex* v. *Meſeley*, H. 38 G. 3. 224

HUSBAND AND WIFE.

See POOR-REMOVAL, No. 1.

INDICTMENT.

1. Every indictment muſt contain a complete deſcription of ſuch facts and circumſtances as conſtitute the crime, without inconſiſtency or repugnancy. But, except in certain caſes, where technical expreſſions, having grown by long uſe into law, are required to be uſed, the ſame ſenſe is to be put on the words of an indictment which they bear in ordinary acceptation: and if the ſenſe of any word be in ordinary acceptation ambiguous, it ſhall be conſtrued according as the context and ſubject-matter require it to be in order to make the whole conſiſtent and ſenſible. The word *until* may therefore be conſtrued either excluſive or incluſive of the day to which it is applied, according to the context and ſubject-matter

matter. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

2. Therefore, where an information on the ſtat. 33 *G.* 3. *c.* 52. *ſ.* 62. prohibiting *officers* of the *Eaſt India* Company, *reſiding in* India, from receiving preſents, charged that the defendants being *Britiſh ſubjects*, on the 1ſt *January* 1794, and from thence for a long time, to wit, *until* the 29th *November* 1795, held certain offices under the Company, and *during all that time reſided in the* Eaſt Indies; and that *whilſt* they held the ſaid offices *as aforeſaid*, and *whilſt they reſided in the* Eaſt Indies *as aforeſaid*, to wit, *on the 29th of* November 1795, they received certain preſents: held that the context ſhewed that the word *until* was to be taken *incluſive* of the 29th *November* 1795. *ib.*

3. But that if it had been incapable of receiving an *incluſive* conſtruction, the words under the firſt videlicet, "*until the 29th of November* 1795," could not have been rejected as ſurpluſage; for that can never be where the allegation is ſenſible and conſiſtent in the place where it occurs, and not repugnant to *antecedent* matter, though laid under a *videlicet*, and however inconſiſtent with an allegation *ſubſequent*. *ib.*

4. An indictment for an aſſault, falſe impriſonment, and reſcue, ſtated that the Judges of the *Court of Record of the town and county*, &c. of *P.* iſſued their writ, directed to *T. B. one of the ſerjeants at mace of the ſaid town and county*, to arreſt *W.*, by virtue of which *T. B.* was proceeding to arreſt *W. within the juriſdiction of the ſaid Court*, but that the defendant aſſaulted *T. B. in the execution of his office*, and prevented his arreſt: held ſuch indictment bad; it not appearing that *T. B.* was *an officer of the Court*: and that there could not be judgment after a *general* verdict on ſuch a count as for a common aſſault and falſe impriſonment, becauſe the jury muſt be taken to have found that the aſſault and impriſonment was for the cauſe therein ſtated; which cauſe appears to have been that the officer was attempting to make an illegal arreſt of another, which, being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Oſmer*, *T.* 44 *G.* 3. 304

5. The voluntary abſence of a chief officer of a corporation upon the charter-day of election of his ſucceſſor is not indictable upon the ſtat. 11 *G.* 1. *c.* 4. *ſ.* 6., unleſs his preſence as ſuch chief officer be *neceſſary* by the conſtitution of the corporation to conſtitute a legal corporate aſſembly for ſuch purpoſe. *Rex* v. *Corry*, *T.* 44 *G.* 3. 371

INFERIOR JURISDICTION.

See LONDON COURT OF REQUESTS.

INSOLVENT DEBTORS' DISCHARGE.

See EXECUTION, No. 1.

INSURANCE.

1. Where a foreign Court of Prize profeſſes to condemn a ſhip and cargo on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured; ſuch ſentence is concluſive in our courts againſt *a warranty of neutrality* of ſuch ſhip and cargo in an action upon a policy of inſurance againſt the underwriter; although inferences were drawn in ſuch ſentence from ex parte ordinances in aid of the concluſion of ſuch infraction of treaty. *Baring* v. *The Royal Exchange Aſſurance Company*, *E.* 44 *G.* 3. 99

2. A ſentence of a foreign Court of Prize is concluſive evidence in an

an action upon a policy of insurance upon every matter within the jurisdiction of such Court upon which it has professed to decide. Therefore where a *Danish* ship, *warranted neutral*, was captured by a *French* ship of war, (*Denmark* being at peace with *France*,) and the court in which she was libelled as prize, professing to consider that the *built* of the vessel was *unknown*, that she was *sold* to a *neutral* subject *only since* the declaration of war, that the bill of sale does not mention her *place of built*, or her *original owner*, that the mate and third officer were naturalized *Danes only since* the declaration of war, and that the greater part of the *crew* were subjects of *hostile* powers, condemned the ship as *good and lawful prize*; such condemnation is conclusive against the *warranty of neutrality* in an action on the policy against the underwriter. And no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of *France*, containing rules to direct the judgment of its Courts in the consideration of the question of neutrality; by which rules the Prize Court appeared to have regulated their judgment in the conclusion they had drawn. *Bolton* v. *Gladstone*, E. 44 G. 3. 155

3. Upon a hostile embargo in a foreign port, the owner, who had separately insured *ship* and *freight*, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned freight: held that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment. *M'Carthy* v. *Abel*, T. 44 G. 3. 388

4. The 25th article of the treaty of *February* 1778, between *France* and *America*, which requires the vessels of the allies, in case either is at war, to be furnished with a passport expressing (inter alia) *the place of habitation* of the commander of the vessel, is not complied with by a passport granting leave "to G. D. commander of the ship called *M. V. of the town of* P., of the burden of," &c; such description of place being applicable only to the *ship* as the last antecedent, which is further described by her burthen in a continuing sentence; and therefore the plaintiff was holden not entitled to recover upon a policy of insurance on such ship warranted *American*, which had been captured by the *French*, and condemned as prize. *Baring* v. *Christie*, T. 44 G. 3. 398

INTEREST.

See PRIZE, No. 1.

JOINDER IN ACTION.

1. A count upon an account stated with the plaintiff, *executrix*, &c. (not saying *as executrix*, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity: and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether, if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, &c. it could be so joined; as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets.

Henshall

Hinſhall v. *Roberts*, in error. *E.* 44 *G.* 3. 150

A., *B.*, and *C.*, having diſſolved partnerſhip, *C.* after ſuch diſſolution drew bills in the partnerſhip firm in favour of *D.*, he not knowing of ſuch diſſolution; upon which *D.* brought his action againſt all the former partners; and *C.* having pleaded his bankruptcy, *D.* entered a noli proſequi as to him, and recovered judgment againſt *A.* and *B.*, which was afterwards ſatisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the reſt of the money on their *joint* credit: held that the ſum ſo paid in ſatisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* againſt *C.* *Oſborne and Amphlett* v. *Harper*, *T.* 44 *G.* 3. 225

An order of the Lord Chancellor, made under the ſtat. 5 *Geo.* 2. *c.* 30, upon the petition of creditors for removing one of the ſeveral aſſignees of a bankrupt's eſtate, not followed up by any re-aſſignment or releaſe of ſuch aſſignee to the remaining aſſignees, nor by any new aſſignment of the commiſſioners under the Lord Chancellor's further order, does not operate to diveſt the legal eſtate out of ſuch removed aſſignee: and conſequently he ought to join in an action of trover brought by the other aſſignees for a ſhip belonging to the bankrupt's eſtate: but if he be not joined, advantage can only be taken by a plea in abatement to the whole action: though the other aſſignees who ſue can only recover their proportional parts. *Blowaze, Knt. and Others, Aſſignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407

JOINT-TENANT.

Where a leaſe for 21 years contained a proviſo, that in caſe either landlord or tenant, or their reſpective heirs or executors, wiſhed to determine it at the end of the firſt 14 years, and ſhould give ſix months' notice in writing *under her or their reſpective hands*, the ſame ſhould ceaſe; held that a notice to quit, ſigned by *two only* of *three* executors of the original leſſor, to whom he had bequeathed the freehold *as joint tenants*, expreſſing the notice to be given *on behalf of themſelves and the third executor*, was not good under the proviſo, which required it to be given under the hands of all three. Neither could ſuch notice be ſuſtained under the general rule of law, that one joint tenant may bind his companions by an act done for *his benefit*; for non conſtat that the determination of the leaſe was for the benefit of the co-joint-tenant; which it was incumbent on the party who wiſhed to avail himſelf of it to prove. And the notice to quit being ſuch as the tenant was to act upon at the time, no ſubſequent recognition of the third executor will make it good by relation: nor was his joining in the ejectment evidence of his original aſſent to bind the tenant by the notice. *Right d. Feſter and Another* v. *Cuthell*, *M.* 45 *G.* 3. 491.

JURISDICTION.

See London Court of Requests. Prize, No. 1. Prohibition.

1. An indictment for an aſſault, falſe impriſonment, and reſcue, ſtated that the Judges of *the Court of record of the town and county*, &c. &c. *P.*, iſſued their writ, directed to *T. B., one of the ſerjeants at mace of the ſaid town and county*, to arreſt *W.*, by virtue of which *T. B.* was proceeding to arreſt *W. within the juriſdiction of the ſaid Court*, but that the defendant aſſaulted *T. B. in the due execution of his office*, and prevented the arreſt: held ſuch indict-

ment bad; it not appearing that *T. B.* was *an officer of the Court:* and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Osmer*, *T.* 44 *G.* 3. 304

2. The stat. 39 *Geo.* 3. *c.* 79. giving a penalty of 20*l.* for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the act *exceeding* 20*l.* may be sued for in the courts *at Westminster:* and any penalty not exceeding 20*l. shall and may* be recovered before any justice of peace; but it also gives, in the same clause, a form of declaration *for recovering* 20*l. in the courts of Westminster.* Yet held that a common informer cannot sue for a penalty of 20*l.* in this court; no such power being given by the statute, and there being no power at common law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank*, as to the sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20*l.* each. *Fleming qui tam* v. *Bailey*, *T.* 44 *G.* 3 313

JUSTICES OF PEACE, CONSTABLES, &c.

1. Where goods were taken by constables under a warrant of distress, granted by a justice of peace for the county of *Kent*, directed "to the constables of the Lower Half Hundred of *C.* and *G. in the county of* Kent;" which warrant recited that the plaintiff, (whose goods were distrained) *of the parish of* G. *in the said county*, was ballotted for the militia of the said county, and having refused to serve, &c. was convicted in a certain penalty; for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of *G.*, within the jurisdiction of the Cinque Ports, and *not within the county of* Kent, the constables are not within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6., and may be sued in trespass without the magistrate's being made a defendant. *Milton* v. *Green and Jenner*, *T.* 44 *G.* 3. 233

2. A constable executing the warrant of a justice of peace, and sued in trespass, without the magistrate, is within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6., and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within *six* days after such demand, as the act directs. *Jones* v. *Vaughan*, *M.* 45 *G.* 3. 445

LEASEHOLD VALUE.

See COMPENSATION.

LONDON COURT OF REQUESTS.

The *London* Court of Requests has jurisdiction by the stat. 39 & 40 *G.* 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the

the defendant may enter a ſuggeſtion on the roll, ſtating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was ſerved with the writ, for the purpoſe of ouſting the plaintiff of his coſts, under the 12th ſect. of the act *Sandby, Clerk*, v. *Miller*, *E.* 44 *G.* 3. 194

MARRIAGE.

A. declared in covenant againſt *B.* and her huſband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.* proteſting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants* the arbitrator *awarded B.* to pay *A.* a certain ſum; and then alleged a breach for non-payment of ſuch ſum. After verdict, on non eſt factum pleaded, held that upon this declaration it muſt be taken that *B. intermarried after* the ſubmiſſion and *before* the *award* made; in which caſe, although the plaintiff could not recover upon the breach aſſigned *for non-payment of the ſum awarded*, becauſe the *marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itſelf *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arreſted on the ground that the marriage was a revocation of the arbitrator's authority, and that ſo the plaintiff could not recover *as for a breach by non-performance of the award*. *Charnley* v. *Winſtanley and his Wife*, *T.* 44 *G.* 3. 266

MASTER AND SERVANT.

See ACTION ON THE CASE, No. 1.

MINES.

See POOR-RATE, No. 3.

MISDEMEANOR.

See AGREEMENT, No. 2.

MORTGAGE.

See COPYHOLD, No. 1.

NOTICE OF ACTION.

See ACTION, NOTICE OF.

NOTICE TO QUIT.

Where a leaſe for 21 years contained a proviſo, that in caſe either landlord or tenant, or their reſpective heirs and executors, wiſhed to determine it at the end of the firſt 14 years, and ſhould give ſix months' notice in writing *under his or their reſpective hands*, the term ſhould ceaſe; held that a notice to quit ſigned by *two only* of *three* executors of the original leſſor, to whom he had bequeathed the freehold *as joint-tenants*, expreſſing the notice to be given *on behalf of themſelves and the third executor*, was not good under the proviſo, which required it to be given under the hands of all three. Neither could ſuch notice be ſuſtained under the general rule of law, that one joint-tenant may bind his companion by an act done for *his benefit*; for non conſtat that the determination of the leaſe was for the benefit of the co-joint-tenant; which it was incumbent on the party who wiſhed to avail himſelf of it to prove. And the notice to quit being ſuch as the tenant was to act upon at the time, no ſubſequent recognition of the third executor would make it good by relation: nor was his joining in the

ejectment evidence of his original aſſent to bind the tenant by the notice. *Right d. Fiſher and Another* v. *Cuthell*, *M.* 45 *G.* 3. 491

PARENT AND CHILD.

See ACTION ON THE CASE, No. 1. for debauching the plaintiff's daughter.

1. The father of a child is entitled to the cuſtody of it, though an infant at the breaſt of its mother, if the Court ſee no ground to impute any motive to the father injurious to the health or liberty of ſuch a child, as by ſending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an *Engliſhwoman*, and apprehenſive only that he meant to ſend the child abroad, but aſſigning no ſufficient reaſon for ſuch her apprehenſion. *Rex* v. *de Manneville*, *E.* 44 *G.* 3. 221

2. If the putative father of a baſtard child obtain poſſeſſion of it by force or fraud, the Court will order it to be reſtored on the application of the mother. *Rex* v. *Moſeley*, *H.* 38 *G.* 3. 224

PARTNERSHIP.

A., *B.*, and *C.*, having diſſolved partnerſhip, *C.*, after ſuch diſſolution drew bills in the partnerſhip firm in favour of *D.*, he not knowing of ſuch diſſolution; upon which *D.* brought his action againſt all the former partners, and *C.* having pleaded his bankruptcy, *D.* entered a noli proſequi as to him, and recovered judgment againſt *A.* and *B.*, which was afterwards ſatisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the reſt of the money on their *joint* credit: held that the ſum ſo paid in ſatisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* againſt *C.* *Oſborne and Amphlett* v. *Harper*, *T.* 44 *G.* 3. 225

PASSAGE-MONEY.

The plaintiff contracted to carry the defendant, his family, and luggage from *Demerary* to *Fluſhing*; and in the courſe of the voyage, within four days ſail of *Fluſhing*, the ſhip was captured by an *Engliſh* ſhip of war, and brought into *England*, and the ſhip and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings ſtill pending againſt the ſhip; but the defendant, and his family were liberated, and their luggage in fact reſtored to their poſſeſſion. Held that, however the queſtion might be as to the plaintiff's right to recover paſſage-money upon an implied aſſumpſit pro ratâ itineris if the ſhip were reſtored, yet pending the proceedings againſt the ſhip as prize in the Admiralty Court no ſuch action could be maintained; for non conſtat, but that the ſhip might be condemned and the freight decreed to the captors. *Mulloy* v. *Backer*, *T.* 44 *G.* 3. 316

PAYMENT.

See ACCORD AND SATISFACTION, No. 1.

PENAL ACTION.

The ſtat. 39 *G.* 3. *c.* 79. giving a penalty of 20*l.* for printing papers to be publiſhed, without adding the printer's name and place of abode, directs that any penalty impoſed by the act *exceeding* 20*l.* may be ſued for in the courts at *Weſtminſter*; and any penalty not exceeding 20*l.* *ſhall and may be* recovered before any juſtice of peace: but it alſo gives, in the ſame clauſe, a form of declaration *for recovering* 20*l.*, in the courts of *Weſtminſter*. Yet held

that a common informer cannot ſue for a penalty of 20*l.* in this court; no ſuch power being given by the ſtatute, and there being no power at common law for a common informer to ſue for any penalty; and that the form of the declaration muſt be read *in blank*, as to the ſum, ſuch form being otherwiſe inapplicable to a larger penalty before given: and that no ſuch action lay to recover two or more penalties of 20*l.* each. *Fleming, qui tam*, v. *Bailey*, *T.* 44 *G.* 3. 313

PLEADING.

See JOINDER IN ACTION.

1. A count upon an account ſtated with the plaintiff, *executrix*, &c. (not ſaying *as* executrix, &c.) cannot be joined with counts on promiſes to the teſtator; for it is no allegation that the promiſes were made to the plaintiff in her repreſentative capacity; and under ſuch a count proof might be given of an account ſtated with her in her individual character. *Qu.* Whether if it had been laid to be on an account ſtated with the plaintiff herſelf, though named *as executrix*, &c. it could be joined, as the cauſe of action would ſtill appear to have ariſen in the time of the executrix, though the money, when recovered, would be aſſets? *Henſhall* v. *Roberts*, *in error*, *E.* 44 *G.* 3. 150

2. An allegation in pleading which is ſenſible and conſiſtent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as ſurpluſage, though laid under a *videlicet*, and however inconſiſtent with an allegation *ſubſequent*. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

3. *A.* declared in covenant againſt *B.* and her huſband, for that *B.* before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.*, proteſting that *B.* had not before her intermarriage performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded* B. to pay *A.* a certain ſum; and then alleged a breach for non-payment of ſuch ſum. After verdict, on non eſt factum pleaded; held that upon this declaration it muſt be taken that *B. intermarried after* the ſubmiſſion and *before* the *award* made; in which caſe, although the plaintiff could not recover upon the breach aſſigned, *for non-payment of the ſum awarded*, becauſe the *marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itſelf *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arreſted on the ground that the marriage was a revocation of the arbitrator's authority, and that ſo the plaintiff could not recover *as for a breach by non performance of the award*. *Charnley* v. *Winſtanley and his Wife*, *T.* 44 *G.* 3. 266

4. The demandant in a writ of right muſt allege in his count that his anceſtor was ſeiſed *of right* as well as that he was ſeiſed *in his demeſne as of fee*. *Dowland* v. *Slade and Wife*, *T.* 44 *G.* 3. 272

5. *Qu.* Whether if one through whom title is derived be improperly ſtated to be heir to her brother, who it appears by the record had a ſon who ſurvived him, and through whom title is properly derived, ſuch erroneous appellation of the ſiſter as heir to her brother, be fatal? *ib.*

6. In an action againſt the marſhal for an eſcape, it being alleged in the declaration

claration that the priſoner was arreſted on meſne proceſs, and brought before a judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the cuſtody of the marſhal, *as by the record thereof now remaining in the Court of B. R.* appears, &c. ſuch allegation is either impertinent and ſurpluſage; for properly ſpeaking, ſuch documents are not *records* nor capable of becoming ſo: or, conſidering them as *quaſi of record*, the allegation is ſufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* priſon, with whom they are properly depoſited. *Wigley* v. *Jones, Marſhal of the Marſhalſea*, T. 44 G. 3. 440

7. Slanderous words muſt be underſtood by the Court in the ſame ſenſe as the reſt of mankind would ordinarily underſtand them. Therefore where one ſaid of another that "*his character was infamous; that he would be diſgraceful to any ſociety; that thoſe who propoſed him as a member of any ſociety muſt have intended an inſult to it; that he would publiſh his ſhame and infamy; that delicacy forbad him from bringing a direct charge, but it was a* MALE *child who complained to him*;" ſuch words were underſtood to mean a charge of unnatural practices, and ſufficiently certain in themſelves to be actionable, without the aid of an innuendo to that purpoſe, which it was admitted could not enlarge the ſenſe. And held that ſuch words could not be juſtified by any plea naming, for the *firſt* time, the perſon from whom the defendant heard the complaint. *Woolnoth* v. *Meadows*, M. 45 G. 3. 403

8. A plea of *nul tiel record*, pleaded to an action of debt on an *Iriſh* judgment, muſt conclude to the country; for though, ſince the Union, ſuch judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins* v. *Lord Viſcount Mathew*, M. 45 G. 3. 473

9. A bill of exchange payable to the *order* of *A.*, is payable to *A.* without alleging any order made; and it is ſufficient to declare that *A. delivered* the bill to the defendant, which he *accepted*, and by reaſon of the premiſes, and according to the cuſtom of merchants, became liable to pay the contents to *A.*, without alleging a *re-delivery* of the bill by the defendant: for if a re-delivery, or ſomething tantamount, to ſhew the aſſent of the drawee to charge himſelf, be neceſſary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c. *Smith* v. *M'Clure*, M. 45 G. 3. 476

POOR-RATE.

1. Where goods are carried along two different lines of canal, one of which is by ſtatute exempted from being rated in reſpect of the *tolls*, and the other not; though the voyage happen to finiſh on the unexempted line, where the tolls became due and are received, yet the canal company ſhall not be rated for more than ſuch proportion of the tolls as accrued in reſpect of the carriage along the unexempted line. And the toll ariſing in reſpect of ſo much per ton per mile is to be rated only for ſo many miles as the goods were carried along the unexempted line. And where the act directs that the tolls ſhould be exempt from any taxes, rates, &c. other than ſuch as the *land* which ſhould be uſed for the purpoſe of the navigation would have been ſubject to if the act had not been made; that goes to exempt the *tolls*, qua *tolls*, altogether from being rated in reſpect of the line

line so exempted, leaving the *land* rateable as before. *Rex* v *The Leeds and Liverpool Canal Company*, T. 44 G. 3. 325

2. Where a corporation was seised in fee of certain unenclosed lands, which were stocked with the cattle of the resident burgesses, or the widows of such, who alone were permitted by the burgesses to claim such right, and also by poor parishioners, who were admitted to such enjoyment from charity; and such lands were altogether omitted out of the poor-rate; the Sessions, on appeal by one who had given notice of his objection to the parish officers, and to the corporation as the party interested under the stat. 41 G. 3. *c.* 23. *s.* 6., having quashed the rate, the Court confirmed that order. *Rex* v. *The Inhabitants of Aberavon*, M. 45 G. 3. 453

3. *Iron mines* are not rateable to the relief of the poor; and being rated conjointly with *coal mines*, the coal whereof was raised by *the owner of the lands for his own use* in smelting the iron, the order of Sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed. *Rex* v. *Cunningham and Others*, M. 45 G. 3. 478

4. Where a corporation were seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses who so stocked were *tenants in common* of the lands so occupied by them, and as *such occupiers* were liable to be rated for the same. *Rex* v. *Watson*, M. 45 G. 3. 480

POOR-REMOVAL.

See SETTLEMENT BY ESTATE, No. 1.

An order of justices removing "*M. F.*, *wife* of *P. F.*, a *Scotch-man*, who never gained a settlement" and their children, to the place of *her* last legal settlement; which order was stated on the face of it to be made *on examination of the husband*, and *with the consent of him and his wife*, was holden good. *Rex* v. *The Inhabitants of Eltham*, E. 44 G. 3. 113

PRACTICE.

1. Affidavits in support of, or in answer to a rule for setting aside an award made a rule of Court under the stat. 9 & 10 *W.* 3. *c.* 15. *s.* 1., there being no action previously brought, nor any cause in court, need not be entitled. *Bainbridge* v. *Houlton*, E. 44 G. 3. 21

2. The Court will not infer that a writ of error was sued out for delay because it was sued out before final judgment signed. And though it should be made returnable before final judgment, it will still operate as a supersedeas upon the judgment, which, when signed in the same term, relates back to the first day of it; and therefore execution issued thereon after such writ of error allowed and served was set aside for irregularity. *Somerville* v. *White*, E. 44 G. 3. 145

3. If one of two defendants taken on a joint ca. sa. be discharged under an insolvent debtors' act, that will not operate as a discharge of the other, the discharge of the former not being with the actual consent of the plaintiff. *Nadin* v. *Battie and Wardle*, E. 44 G. 3. 147

4. The Court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form. *Reubal* v. *Prosser*, T. 44 G. 3. 291

5. An application to make the plaintiff, who resided abroad, give security

rity for the costs refused after notice of trial given; as the defendant might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walters* v. *Brythall*, T. 44 G. 3. 338

6. Where a writ of fi. fa. expires in the vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file it. *Rex* v. *The Sheriff of Berks*, T. 44 G. 3. 386

7. A demand of a plea indorsed on the declaration when delivered is good, and a rule to plead may be given afterwards, without any fresh demand of a plea. *Maxwell* v. *Skerrett*, M. 45 G. 3. 517

8. Bail may render without justifying; and where the rule expires in vacation a render on the first day of the ensuing term, sedente Curiâ, is good, though notice were not given till afterwards on the same day, and after a writ of procedendo had issued to the inferior court where the cause originated. *Wiggins* v. *Stephens*, M. 45 G. 3. 533

PRESSING.

1. The Court will not, at the prayer of the *master*, grant a habeas corpus to bring up an apprentice impressed, he being willing to enter into the king's service. *Ex parte John Landsdown*, E. 44 G. 3. 38

2. A seaman serving in the merchant service is not exempt from being impressed because he is a freeholder. *Rex* v. *Douglas*, M. 45 G. 3. 477

PRINCIPAL AND AGENT.

One who covenants for *himself, his heirs*, &c. and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf of such other*

person. *Appleton* v. *Binks*, E. 44 G. 3. 148

PRINTERS.

See PENAL ACTION, No. 1.

PRIZE.

See FOREIGN SENTENCES, PASSAGE-MONEY.

The Prize Court of Appeals has jurisdiction to decree that one who was co agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay *interest* on such proceeds while in his hands to the claimant. And *B. R.* will not grant a prohibition to the Prize Court to restrain it from executing such decree, either on the ground that it did not appear on the proceedings below that the agent was a *registered* agent under the stat. 33 G. 3. *c.* 65.; because that Court has original jurisdiction *in rem* and its incidents, independent of the statute; nor on the ground that the Court below were restrained by the 32d clause of the act from decreeing restitution of more than the *net proceeds* of the sale, awarded upon condemnation; because *interest* made of such *net proceeds* in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that *interest* had *in fact* been made by such agent; because that was a fact for the Court below to decide upon, and they must be presumed to have decided on satisfactory evidence. *Willis* v. *The Commissioners of Appeals in Prize Causes*, E. 44 G. 3. 22

PROHIBITION.

Where the Spiritual Court incidentally determines any matter of common law cognizance, such as the construction of an act of parliament, other-

otherwiſe than as the common law requires, prohibition lies after ſentence; although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below. *Gould* v. *Gapper, Clerk*, T. 44 G. 3. 345

PROMOTIONS.

Mr. *Manſfield*, one of the King's counſel, on the death of Lord *Alvanley*, Lord Chief Juſtice of *C. B.* was promoted to that office in *Hilary* vacation 1804, and was knighted. And on the 25th of *April* was called to the degree of Serjeant at Law, and took his ſeat on the bench, and gave rings with this motto, *Serus in cœlum redeas.*

On *Saturday* the 28th of *April* 1804 the following gentlemen took their places within the Bar:

As King's Serjeant, Mr. Serjeant *Williams.*

As King's Counſel, Mr. *Holliſt*, Mr. *Milles*, Mr. *Wilſon*, Mr. *Topping*; and with a patent of precedence, Mr. *Fonblanque.* 1

In the *Trinity* vacation 1804 Mr. *Gibbs* was made Chief Juſtice of *Cheſter*; and Meſſrs *Cox*, *Harvey*, and *Stanley*, Barriſters at Law, were appointed Maſters in Chancery. 445

RECORD.

1. In an action againſt the marſhal for an eſcape, it being alleged in the declaration that the priſoner was arreſted on meſne proceſs, and brought before a Judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the cuſtody of the marſhal, *as by the record thereof now remaining in the court of B. R.* appears, &c. ſuch allegation is either impertinent and ſurpluſage; for, properly ſpeaking, ſuch documents are not *records*, nor capable of becoming ſo: or, conſidering them as *quaſi of record*, the allegation is ſufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* priſon, with whom they are properly depoſited. *Wigley* v *Jones, marſhal of the Marſhalſea*, T. 44 G. 3. 440

2. A ſcire facias upon a recognizance of bail taken in open court in *B. R.* is properly ſuable in *Middleſex*, where the record is, though all the previous proceedings which commenced by original were in *London.* And ſemble that it could not be ſued elſewhere than in *Middleſex.* *Coaſter* v. *Burke and Another, Bail of Price*, M. 45 G. 3. 461

3. A plea of *nul tiel record*, pleaded to an action of debt on an *Iriſh* judgment recovered, muſt conclude to the country; for though, ſince the Union, ſuch judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins* v. *Ld. Viſcount Mathew*, M. 45 G. 3. 473

RELATION.

See JOINT TENANT, No. 1.

REQUESTS, LONDON, COURT OF.

See LONDON COURT OF REQUESTS.

RIGHT, WRIT OF.

1. The demandant in a writ of right muſt allege in his count that his anceſtor was ſeiſed *of right*, as well as that he was ſeiſed *in his demeſne as of fee.* *Dowland* v. *Slade and Wife*, T. 44 G. 3. 272

2. *Qu.* Whether if one, through whom title is derived, be improperly ſtated to be *heir* to her brother, who it appears by the record had a ſon who ſurvived him, and through whom title is properly derived, ſuch erroneous appellation of the ſiſter, as heir to her brother, be fatal? *ib.*

ROGUE AND VAGABOND.

See VAGRANT.

SEAMAN.

See PRESSING.

SETTLEMENT.

See POOR REMOVAL, No. 1.

By Apprenticeſhip.

Where a ſum agreed to be given with an apprentice was five guineas, which was inſerted in the indenture, and the duty paid accordingly, by ſtat. 8 *Ann. c.* 9.; held well, though in fact only four guineas were paid; for the *full ſum received, given, paid, agreed, or contracted for*, as required by the act, was inſerted, and the duty paid for it; and the ſtamp uſed was of the ſame deſcription, and the duty appropriated to the ſame fund, as if four guineas only had been inſerted and paid for, ſuppoſing that would have ſufficed. *Rex* v. *The Inhabitants of Keynſham*, *T.* 44 *G.* 3. 309

By Eſtate.

One who is reſident on an eſtate granted to him for lives, in conſideration of two guineas fine and 1*s.* rent, cannot be removed therefrom, though actually chargeable. But ſemble he cannot gain a ſettlement by 40 days reſidence as on *his own* eſtate under the ſtat. 9 *G.* 1., the conſideration being under 30*l.* *Rex* v. *The Inhabitants of Martley*, *E.* 44 *G.* 3. 40

By Evidence of Relief.

The Seſſions having decided in favor of a ſettlement in *A.* by which the pauper's father was proved to have been *relieved while reſident in another pariſh* 40 years ago, and before the pauper's birth; and the only evidence to oppoſe this being that of the pauper's own birth in *B.* this Court confirmed the order of Seſſions on a caſe reſerved. *Rex* v. *The Inhabitants of Wakefield*, *T.* 44 *G.* 3. 335

By Hiring and Service.

1. Where nothing is ſaid in a contract of hiring about time but a reſervation of *weekly* wages, it is a *weekly hiring* only. Therefore where the contract was for the ſervant to live with his maſter, the latter finding him board and lodging, and *paying him* 2*s.* 6*d.* *per week*, no ſettlement could be gained by ſervice for more than a year under ſuch contract. *Rex* v. *The Inhabitants of Pucklechurch*, *T.* 44 *G.* 3. 382

By taking a Tenement.

1. Where a corporation by a verbal agreement with a pauper, leaſed to him the tolls of a market for above 10*l.* a-year; held that he could not gain a ſettlement thereby, as no intereſt could paſs from a corporation but under their ſeal; therefore he had no more than a mere licence to collect the toll. But if ſuch toll had been leaſed to him under ſeal of the corporation, ſemble that he would have gained a ſettlement by reſiding for 40 days in the ſame pariſh where the market was. *Rex* v. *The Inhabitants of Chipping-Norton*, *T.* 44 *G.* 3. 239

2. One may gain a ſettlement by renting a tenement of above 10*l.* a-year in the pariſh where he *reſided*, though ſuch reſidence be *in a turnpike houſe*, as ſervant to the collector for whom he received the tolls; for the general turnpike act 13 *G.* 3. *c.* 84. *ſ.* 56. only ſays that "no gate-keeper or perſon *renting the tolls and reſiding in the toll-houſe* ſhall *thereby* gain a ſettlement, *i. e.* by ſuch taking of the toll-houſe or renting the tolls. *Rex* v. *The Inhabitants of Denbigh*, *T.* 44 *G.* 3. 333

SHARE.

See DEVISE, No. 6.

SHIPS.

1. The ſhip regiſter acts do not apply to a transfer of property by operation of law, ſuch as from the commiſſioners to the aſſignees of a bankrupt. *Bloxam Knight and Others, Aſſignees of Ward, a Bankrupt*, v. *Hubbard*, T. 44 G. 3. 407

2. Under the ſhip regiſter acts 7 & 8 *W.* 3. *c.* 22. *ſ.* 21., and 26 G. 3. *c.* 60. *ſ.* 3, 4, 5. 16., and 34 G. 3. *c.* 68. *ſ.* 15, 16. in order to make title to a ſhip ſold at ſea, whether in whole or in part, ſuch ſale muſt be acknowledged by indorſement of the certificate of regiſtry in the manner therein deſcribed, and a copy of ſuch indorſement be delivered by the vendee to the perſons authorized to make regiſtry, (which officers are *directed* to make an entry thereof, to be indorſed on the oath or affidavit upon which the original certificate of regiſtry was obtained, and to make a memorandum in the book of regiſters, and to give notice thereof to the commiſſioners of the cuſtoms;) and it is not ſufficient for the vendee to regiſter ſuch ſhip de novo in another port where he reſided, though he removed the ſhip thither, and ſhe never returned to her original port after the ſale. *ib.*

SLANDER.

Slanderous words muſt be underſtood by the Court in the ſame ſenſe as the reſt of mankind would ordinarily underſtand them. Therefore where one ſaid of another that "*his character was infamous; that he would be diſgraceful to any ſociety; that thoſe who propoſed him a member of any ſociety muſt have intended an inſult to it; that he would publiſh his ſhame and infamy; that delicacy forbad him from bringing a direct charge, but it was a* MALE *child who complained to him;*" ſuch words were underſtood to mean a charge of unnatural practices, and ſufficiently certain in themſelves to be actionable, without the aid of an inuendo to that purpoſe, which it was admitted could not enlarge the ſenſe. And held that ſuch words could not be juſtified by any plea naming for the firſt time the perſon from whom the defendant heard the complaint. *Woolnoth* v. *Meadows*, M. 45 G. 3. 463

SPIRITUAL COURT.

See PROHIBITION.

STAMPS.

Where a ſum agreed to be given with an apprentice was five guineas, which was inſerted in the indenture, and the duty paid accordingly, by ſtat. 8 *Ann. c.* 9.; held well; though in fact only four guineas were paid; for *the full ſum received, given, paid, agreed, or contracted for*, as required by the act, was inſerted, and the duty paid for it; and the ſtamp uſed was of the ſame deſcription, and the duty appropriated to the ſame fund, as if four guineas only had been inſerted and paid for, ſuppoſing that would have ſufficed. *Rex* v. *The Inhabitants of Keynſham*, T. 44 G. 3. 309

STATUTES.

The conſtruction thereof, though relating to matters of an eccleſiaſtical nature, belongs to the ſuperior courts of common law. *Gould* v. *Gapper*, T. 44 G. 3. 345

Edward I.

6. *c.* 1. (Stat. of *Glouceſter*. Coſts.) 262

Henry VIII.

23. *c.* 15. (Coſts.) *ib.*

James I.

4. *c.* 3. (Coſts.) *ib.*

Charles II.

13. *ſt.* 2. *c.* 2. (Coſts in error.) 545

19. r. 6. (Leaſes for lives.) 41
25 & 26. c. 9. (Coſts. Certificate.) 489
29 ch. 3. ſ. 4. (Statute of Frauds) 10

William and *Mary* and *William*.

1. c. 18. ſ. 18. (Toleration act.) 294
7 & 8. c. 22. (Ship regiſter) 407
9 & 10. c. 15. (Awards.) 21. 189

Anne.

4. c. 16. ſ. 4. (Coſts.) 261. 3
8. c. 9. ſ. 35. 39. (Stamps.) 309

George I.

9. c. 7. ſ. 5. (Settlement.) 40
11. c. 4. ſ. 6. (Corporate election) 372

George II.

5. c. 30. (Bankrupt.) 407
7. c. 8. ſ. 6. (Stockjobbing.) 107
13. c. 17. (Apprentice impreſſed.) 38
17. c. 5. (Vagrant act.) 339
24. c. 44. ſ. 6. (Juſtices of peace and conſtables. Action.) 233. 445

George III.

7. c. . (*Stonehouſe* bridge act.) 356
10. c. . *Leeds* and *Liverpool* canal act.) 325
13. c. 84. ſ. 56. (Settlement. Turnpike.) 333
13. c. 63. (Ship regiſter) 407
13. c. 82. ſ. 62. (*Eaſt India* Company.) 244
13. c. 66. (Prize) 28
24. c. 58. (Ship regiſter). 407
29. c. 69. ſ. 184. (*Weſt India* Dock Company. Notice.) 115
c. 79. (Printers.) 313
39 & 40. c. 104. (*London* Court of Requeſts.) 194
41. c. 23. ſ. 6. (Poor rate.) 453
43. c. 55. (Compenſation for lands taken by government.) 534
c. 160. (Prize.) 30

STOCK.

1. In an action on the caſe for not accepting ſtock agreed to be transferred on requeſt, an averment that the plaintiff was ready and willing to transfer, and requeſted the defendant to accept the ſtock, which he refuſed, can only be ſatisfied by ſhewing an actual tender and refuſal, or that the plaintiff waited at the Bank on the day when it was underſtood that the transfer was to be made until the cloſe of the transfer books, which was the lateſt time when the transfer could be made. *Bordenave* v. *Gregory*, E. 44 G. 3. 107

2. Semble that in ſuch an action it is not neceſſary by the ſtat. 7 G. 2. c. 8. ſ. 6. for the plaintiff to ſhew that he transferred the ſtock to another at the *next* poſſible transfer day after default made by the original contractor, provided the ſtock were transferred before the action brought: though, if the plaintiff might have obtained more for the ſtock by a ſale on any intermediate day between the original default and the actual ſale, that will go in reduction of the damages ſuſtained by the plaintiff by ſuch default. *ib.*

3. In another caſe of the ſame kind, the evidence being that the ſtock was contracted to be transferred on *a certain day*, and the averment in the declaration being the ſame as in the above caſe, that it was to be transferred *on requeſt*, the Court ſaid, that if the objection had been taken at the trial there muſt have been a nonſuit. *Bordenave* v. *Bartlett*, E. 44 G. 3. 111

SURPLUSAGE.

An allegation in pleading which is ſenſible and conſiſtent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as ſurpluſage, though laid under

under a *videlicet*, and however inconsistent with an allegation *subsequent*. *Rex* v. *Stevens and Agnew*, T. 44 G. 3. 244

STOPPING IN TRANSITU.

Where *A.* and *B.*, traders living in *London*, were in the course of ordering goods of the defendants, cotton manufacturers at *Manchester*, *to be sent* to *M.* and Co. *at Hull*, for the purpose of being afterwards sent to the correspondents of *A* and *B. at Hamburgh*; and on the 31st of *March A.* and *B.* sent orders to the defendants for certain goods *to be sent* to *M.* and Co. *at Hull, to be shipped for* Hamburgh *as usual*: held that as between buyer and seller the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of *M.* and Co. *at Hull*; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at *Hull, were to receive a new direction from the vendees*. But it was competent for *A.* and *B.*, who became insolvent some time in *July*, but committed no act of bankruptcy till the 26th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*. And held that the circumstances of the bankrupts having called a meeting of their creditors, and having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants; though done by the bankrupts in a situation of impending bankruptcy at the time; the defendants, at the time of such giving up of the goods by the bankrupts, holding possession of the goods upon a claim of right to stop them in transitu. *Dixon and Others, Assignees of Battier and Son, Bankrupts*, v. *Baldwin and Another*, E. 44 G. 3. 375

SUPERSEDEAS.

See PRACTICE, No. 2.

TENANTS IN COMMON.

Where a corporation were seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses, who so stocked, were tenants in common of the lands so occupied by them, and as such occupiers were liable to be rated for the same. *Rex* v. *Watson*, M. 45 G. 3. 480

TENDER AND REFUSAL.

See EVIDENCE, No. 2.

TITHES.

The *London* Court of Requests has jurisdiction, by the stat. 39 & 40 G. 3. c. 104. over a contract for the retention of *tithes* by the tenant, the value of which was under 5*l.*; and therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs under the 12th section of the act. *Sandby, Clerk*, v. *Miller*, E. 44 G. 3. 195

TOLERATION ACT.

See FALSE IMPRISONMENT, No. 1.

TOLLS.

See TURNPIKE.

1. Where it appeared in evidence upon an action of indebitatus aſſumpſit for toll that a corporation were entitled by a general grant of toll, explained by uſage to be due for all commercial goods paſſing in and out of their city on horſes or in carts or waggons (that is, at the rate of 1*d.* for every horſe load, and 2*d.* for every cart-load drawn by one horſe, and 2*d.* more for each additional horſe); held that any alteration of the carriage by which the goods were ſo conveyed, as by taking them in ſtage coaches inſtead of carts or waggons, could not vary the right of toll in the proportion of 2*d.* for each horſe drawing the coach, although the number of horſes were eſtimated by the weight of paſſengers rather than of goods. *The Mayor &c. of Carliſle* v. *Wilſon, E.* 44 *G.* 3. 2

1. Where a corporation by a verbal agreement with a pauper leaſed to him the tolls of a market for above 10*l.* a-year; held that he could not gain a ſettlement thereby, as no intereſt could paſs from a corporation but under their ſeal: therefore he had no more than a mere licence to collect the toll. But if ſuch toll had been leaſed to him under ſeal of the corporation, ſemble that he would have gained a ſettlement by reſiding for 40 days in the ſame pariſh where the market was. *Rex* v. *The Inhabitants of Chipping-norton, T.* 44 *G.* 3. 239

1. Where goods are carried along two different lines of canal, one of which is by ſtatute exempted from being rated in reſpect of the *tolls*, and the other not; though the voyage happen to finiſh on the unexempted line where the tolls become due and are received, yet the Canal Company ſhall not be rated for more than ſuch proportion of the tolls as accrued in reſpect of the carriage along the unexempted line. And the toll ariſing in reſpect of ſo much per ton per mile is to be rated only for ſo many miles as the goods were carried along the unexempted line. And where the act directs that the tolls ſhould be exempt from any taxes, rates, &c. other than ſuch as the *land* which ſhould be uſed for the purpoſe of the navigation would have been ſubject to if the act had not been made; that goes to exempt the *tolls*, qua *tolls*, altogether from being rated in reſpect of the line ſo exempted, leaving the *land* rateable as before. *Rex* v. *The Leeds and Liverpool Canal Company, T.* 44 *G.* 3. 325.

TRESPASS.

See FALSE IMPRISONMENT.

1. Where goods were taken by conſtables under a warrant of diſtreſs granted by a juſtice of peace for the county of *Kent*, directed "to the conſtables of the lower Half Hundred of *C.* and *G. in the county of* Kent;" which warrant recited that the plaintiff (whoſe goods were diſtrained), *of the pariſh of* G. *in the ſaid county*, was ballotted for the militia of the ſaid county, and having refuſed to ſerve, &c. was convicted in a certain penalty, for levying which the warrant was granted: if it turn out that the warrant was executed within a certain part of the pariſh of *G.* within the juriſdiction of the Cinque Ports, and *not within the county of* Kent, the conſtables are not within the protection of the ſtat. 24 *G.* 2. *c.* 44. *ſ.* 6. and may be ſued in treſpaſs without the magiſtrate's being made a defendant. *Milton* v. *Green and Jenner, T.* 44 *G.* 3. 233

2. A conſtable executing the warrant of a juſtice of peace, and ſued in treſpaſs, without the magiſtrate, is within the protection of the ſtat. 24 *G.* 2. *c.* 44. *ſ.* 6. and entitled to a verdict on proof of ſuch warrant; having firſt complied with the plaintiff's demand of a peruſal and copy of the warrant before the action brought, though not within *ſix* days after ſuch demand, as the act directs. *Jones* v. *Vaughan*, *M.* 45 *G.* 3. 445

TROVER.

1. An order of the Lord Chancellor, made under the ſtat. 5 *G.* 2. *c.* 30., upon the petition of creditors, for removing one of ſeveral Aſſignees of a bankrupt's eſtate, not followed up by any re-aſſignment or releaſe of ſuch aſſignee to the remaining aſſignees, nor by any new aſſignment of the commiſſioners under the Lord Chancellor's further order, does not operate to diveſt the legal eſtate out of ſuch removed aſſignee: and conſequently he ought to join in an action of trover brought by the aſſignees for a ſhip belonging to the bankrupt's eſtate. *Bexam and Others, Aſſignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407
2. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though if there be no ſuch plea the other aſſignees who ſue can only recover their proportional parts. *ib.*
3. A ſale of a ſhip (which was afterwards loſt at ſea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a ſufficient converſion to enable the aſſignees of the bankrupt to maintain trover, without ſhewing a demand and refuſal. *ib.*

TURNPIKE.

One may gain a ſettlement by renting a tenement of above 10*l.* a-year in the pariſh where he *reſided*, though ſuch reſidence were *in a turnpike-houſe*, as ſervant to the collector for whom he received the tolls; for the general turnpike act 13 *G.* 3. *c.* 84. *ſ.* 56. only ſays that "no gate-keeper or perſon *renting the toll and reſiding in the toll-houſe*, ſhall *thereby* gain a ſettlement," *i.e.* by ſuch taking of the toll-houſe or renting the tolls. *Rex* v. *The Inhabitants of Denbigh*, *T.* 44 *G.* 3. 333

UNTIL.

See INDICTMENT, No. 12.

VAGRANT.

By the vagrant act 17 *G.* 2. *c.* 5. after a rogue and vagabond has been committed to the Seſſions, and they, adjudging him to be *a rogue and vagabond*, order him to be further impriſoned and kept to hard labour for ſix months, and to be publicly *whipped* during that time, and that after the expiration of his impriſonment he ſhould be *ſent and employed in his Majeſty's ſervice purſuant to the ſtatutes*, &c.: held that the whole forms one ſentence; and ſuch order being defective in the latter part, for want of adjudicating whether the party were to ſerve his Majeſty by *ſea* or *land* as diſcriminated in the ſtatute, the conviction ſhall be quaſhed, though the former part of the ſentence, adjudging *the rogue and vagabond* to be *whipped*, be valid. *Rex* v. *Patchett*, *T.* 44 *G.* 3. 339

VALUATION OF PREMISES.

See COMPENSATION.

VARIANCE.

See STOCK, No. 3.

VIDELICET.

An allegation in pleading which is ſenſible and conſiſtent in the place where it occurs, and not repugnant to

to *antecedent* matter, cannot be rejected as ſurpluſage, though laid under a videlicet, and however inconſiſtent with an allegation *ſubſequent*. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

See INDICTMENT, No. 1, 2, 3.

VENUE.

A ſcire facias upon a recognizance of bail taken in open court in *B. R* is properly ſuable in *Middleſex*, where the record is; though all the previous proceedings which commenced by original were in *London*. And ſemble that it could not be ſued elſewhere than in *Middleſex*. *Coxeter* v. *Burke and Another*, *Bail of Price*, *M.* 45 *G.* 3. 461

WEST INDIA DOCKS.

The ſtat. 39 *G.* 3. *c.* 69. *ſ.* 184. directs that the *Weſt India* Dock Company ſhall ſue in the name of their treaſurer in all actions by or on behalf of the Company, and that he ſhall be ſued for the recovery of any claim or demand upon, or of any damages occaſioned by the Company; and *ſ.* 185, after extending the protection of the ſtat. 24 *G.* 2. *c.* 44. for privileging juſtices of the peace in actions brought againſt them, as ſuch, to the lord mayor and aldermen of *London* acting under this act beyond the limits of the city; directs that "no action ſhall be commenced againſt *any perſon or perſons for any thing* done *in purſuance or under colour of this act*, until after 14 days' notice in writing, or after tender of amends," &c.: held that the treaſurer of the Company is a *perſon* within the ſaid clauſe; and being ſued for an act done by the Company which induced an injury to the plaintiffs, was entitled to ſuch notice before the action brought. The notice is neceſſary in actions for treſpaſſes or torts; but *qu.* Whether in aſſumpſit? *Wallace* v. *Smith*, *Treaſurer of the Weſt India Dock Company*, *E.* 44 *G.* 3. 115

WILL.

See COPYHOLD, No. 1. DEVISE.

WORDS, CONSTRUCTION OF.

"*Charges.*" *See* CHARGES.

"*Share.*" *See* DEVISE, No. 6.

"*Unleſs.*" *See* AGREEMENT, No. 3 and 5.

"*Until.*" *See* INDICTMENT, No. 12.

WRIT,

See PRACTICE, No. 6.

The Court will quaſh a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form. *Reutel* v. *Preſton*, *T.* 44 *G.* 3. 291

WRIT OF RIGHT.

See RIGHT, WRIT OF.

END OF THE FIFTH VOLUME.

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